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S. HRG. 104–870

CHILD PORNOGRAPHY PREVENTION ACT OF 1995

GOVDOC
Y 4.J89/2:S.Hrg.
104 – 870

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1237

A BILL TO AMEND CERTAIN PROVISIONS OF LAW RELATING TO CHILD PORNOGRAPHY, AND FOR OTHER PURPOSES

JUNE 4, 1996

Serial No. J–104–84

Printed for the use of the Committee on the Judiciary

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CHILD PORNOGRAPHY PREVENTION ACT OF 1995

TUESDAY, JUNE 4, 1996

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Thurmond, Grassley, Biden, Simon, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. This morning, the Judiciary Committee will conduct a hearing on S. 1237, the Child Pornography Prevention Act of 1995, which I introduced along with Senators Grassley, Thurmond, and Abraham.

Child pornography is a particularly pernicious evil. It abuses, degrades, and exploits the weakest and most vulnerable members of our society. Perhaps the greatest harm that results from child pornography is its role in the vicious cycle of child sexual abuse and exploitation. Child pornography stimulates the sexual appetites and encourages the activities of child molesters, pedophiles, and child porn collectors. It creates a demand for more and more such material and it can be used to seduce young people into becoming new victims of sexual abuse and exploitation.

Current Federal law reflects the overwhelming bipartisan consensus that there is no place for such filth in our society. Those laws, however, we written to deal with the types of pornographic materials and production technologies in existence at the time of their adoption. They apply only to visual depictions of children engaging in sexually explicit conduct whose production involved the use of an actual minor engaging in such conduct—materials such as photographs, films, and videotapes.

Regrettably, computers and computer imaging technology, unheard of only a few short years ago, have opened the door to new means of producing a virtually limitless variety and quantity of high-quality child pornography—material that is outside the scope of our current laws. The problem is simple. While Federal law has failed to keep pace with technology, the purveyors of child pornography have gone high-tech and on-line.

Today, visual depictions of children engaging in any imaginable form of sexual conduct can be produced entirely by computer with-

out using even the actual children. Computers can be used to alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for prosecutors to identify individuals or to prove that the offending material was produced using children.

Computers can even be used to alter perfectly innocent pictures or videos of children to create visual depictions of those children engaging in sexual conduct, et cetera. A child abuser, pedophile, or child pornographer can use such depictions to stimulate his own sexual appetites, show these depictions to children in an effort to seduce them into submitting to sexual exploitation, or copy and distribute or sell the depictions to others.

Unfortunately, the computer equipment and expertise required to produce such high-tech kiddie porn is readily available to any individual. All a pornographer or a pedophile needs is a personal computer with a few inexpensive and easy-to-use accessories, such as a scanner to upload pictures, together with image editing and morphing software costing as little as $50 top $100, all available at virtually any computer store or through mail order computer catalogs.

Some may argue that because the computerized production of what is sometimes referred to as composite or pseudo-child pornography does not directly involve, or law enforcement officials cannot prove the use of, actual children engaging in sexually explicit conduct, such material does not harm or threaten our children, and we should therefore turn a blind eye to its existence. In my opinion, this is a mistaken view.

The use of child pornography to stimulate the sexual appetites of child molesters and pedophiles, and particularly the use of child pornography as a seduction tool and to break down the inhibitions of other children to sexual abuse and exploitation, is well known and documented. Advances in computer imaging and morphing technologies have made composite or pseudo-child pornography increasingly indistinguishable from live photo depictions of actual children engaging in sexual conduct.

S. 1237, our bill, will close this computer-generated loophole and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-tech child pornography. It would establish for the first time a Federal statutory definition of child pornography. Any visual depiction of sexually explicit conduct, however produced, would be classified as child pornography if its production involved the use of a minor engaging in sexually explicit conduct, or it depicts or appears to depict a minor engaging in sexually explicit conduct, or it is promoted or advertised as depicting a minor engaging in sexually explicit conduct. The bill does not propose new or expanded restrictions or regulations regarding the Internet and should not be confused with such measures.

We on the Judiciary Committee and we as sponsors of this bill are open to constructive suggestions on ways of addressing the current problems of child pornography or of improving the bill. I am prepared to incorporate Senator Bob Dole's proposed penalty increases for child pornography offenses, and it is my hope that the

Congress can act on these problems this year and we are going to do all that we can to see that the Congress does.

This is an area that simply has to be handled, and handled swiftly, carefully, and in the best interests of our children and our society. I, for one, believe that we have to really define this area and we are going to do it in this legislation, so we will be interested in any suggestions from anybody who is an expert in these areas or otherwise who has ideas as to how we might make this legislation better or how we might really fight these pernicious problems that are hurting our society.

Senator Thurmond, we will turn to you. Although I was going to go to the witnesses, we will turn to you for any comments you have because I know you have to get to the floor.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, I want to commend you for convening today's hearing to further our efforts to fight child pornography. We have worked together over the years on this important issue and we both share a philosophy of zero tolerance when it comes to child pornography.

While serving as Chairman of this committee, I was pleased to support and see enacted into law the Child Protection Act of 1984. This legislation made important and needed changes to the 1977 Sexual Exploitation of Children Act, including an increase in penalties, provisions for criminal and civil forfeiture, inclusion of the Child Protection Act under the Federal wiretap statute, and raising the age for the definition of a minor from 16 to 18.

Also, while Chairman, I was pleased that the Child Sexual Abuse and Pornography Act of 1986 became law. This law added civil remedies for personal injuries suffered by a minor who is a victim, increased sentences for repeat offenders, and prohibited the production and use of advertisements for child pornography.

There have been other laws passed to protect our children, but I want to note finally a 1990 law adopted making it a Federal crime to possess three or more pieces of child pornography. This law and others we have passed provided valuable assistance to law enforcement in fighting the purveyors of filth.

Mr. Chairman, as you know, I joined with you as an original cosponsor of this legislation, S. 1237, which is the focus of the hearing today. Our laws must keep pace with changing technology, and I believe this legislation furthers our commitment to punish those who would rob the innocence of America's children.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Thurmond.

We will turn to our Democrat leader on the committee, Senator Biden.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you very much, Mr. Chairman. I apologize to my colleagues and to the witnesses for being late. I was at a Foreign Relations meeting on expansion of NATO with Mr. Walesa, and I apologize.

None of us here today can, or I expect will argue with the proposition that trafficking in child pornography is probably the most heinous crime in terms of our culture that anyone could think of. If you think in terms of the ultimate counter-culture, it is that, the abuse of children. Protecting our children from abuse and exploitation at the hands of a stranger or a neighbor or a trusted adult, or in some cases a family member, is one of the most important duties of our criminal justice system. These children have no way out, as a practical matter, without us.

There are many forms of abuse, but the use of children to make pornography is obviously among the most devastating. The pornographer involves children in conduct they should not have any part in and then creates a record of that abuse which in many cases he shares with others, and in many cases ruins forever the life of the child involved. The abuse of the children involved does not end when their participation in making pornography ends. It continues as long as the record of the material exists.

I have been concerned, as we all have here, with the effects of this abuse on children for the past two decades. As other members here, I was a cosponsor of the Protection Against Sexual Exploitation Act of 1977, the first Federal law to deal directly with the problem of child pornography. Since that time, this committee and many of its members have kept a sharp eye on the problem of child pornography and where we have found gaps in the coverage of the criminal law we have moved as quickly as we have been able to to attempt to fill them.

For example, after the Supreme Court's decision in the *Ferber* case, we strengthened the Federal child pornography laws to include non-commercial child pornography and any depiction that showed a child engaged in sexual activities, whether or not it met the legal definition of "obscene."

In 1988, I worked with my good friend, Senator Thurmond, to make it a Federal crime to buy and sell children, or even to transfer their custody, for use in making child pornography. Even back then, the computer was becoming an increasingly important tool of the child pornographer, so we specifically added language to make it a Federal crime to transport child pornography using a computer, in addition to the mails.

As part of the 1990 crime bill, I proposed, and we passed into law, several measures directed to protecting children from the problems associated with child pornography and child abuse. That legislation increased criminal penalties for drug-related child exploitation and created a number of important victims' rights protections for children who were abused and exploited, preventing the criminal justice system from adding to their suffering. Just 2 years ago, as part of the 1994 crime bill, we enacted a sense of the Senate resolution when we disagreed with the Justice Department's reading of our statute to restate our original intent.

I believe today's hearing is an important step in this continuing commitment to wipe out child pornography and further strengthen our protection of our children from exploitation. The witnesses we will hear from today are best positioned to talk about the changes in technology and other factors that suggest that children are being abused in ways that are not covered by current law. I look forward

to hearing from these experts and to discussing with them the best and most effective way to revise our laws to ensure that any gaps are filled and that we maintain the highest possible level of protection for our children.

The Supreme Court has made clear that child pornography has no redeeming value and does great harm. Thus, it merits no—I want to emphasize this—it merits no first amendment protection. Let me say that again. It merits no first amendment protection. As one who has been either credited or accused of having an inordinately high regard for the first amendment, I want to say it one last time. It merits no first amendment protection, zero.

Working within the parameters laid down by the Court, we must do everything we can to stop child pornographers and keep our children safe. We have made some significant strides in the crime bill and subsequent bills dealing with pedophiles, and I predict to you what is going to happen here is that we are just for the first time, in my view, beginning to explore in any depth the motivation of the offender, the likelihood of the offender being rehabilitated, the requirement of society and the criminal justice system to deal with that deviation and the extent to which under the first amendment we can move beyond where we have in protecting children.

So I thank you, Mr. Chairman, once again for pursuing this, and I want to acknowledge—I see him here as well—Senator Grassley, who has been, I guess, for the last 20 years, Chuck, or 18 years, one of the most ardent, if not the most ardent proponent of increasing and expanding the protection for children.

So I look forward to the hearing.

The CHAIRMAN. Well, thank you, Senator Biden. We have got to do something about this problem. It is a big problem. This is the beginning hearing. We want everybody looking at this bill; we want to make it as perfect as we can and we are open to very good suggestions. We have an excellent set of witnesses here today.

Because Senator Grassley has been such a leader in these matters, I am going to deviate from our rule and just call on him as the last person to make a statement. Then we will call on our witnesses.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, the reason we are here, Mr. Chairman—and I thank you very much for your response to this problem. Your bill is a very good bill and I am happy to be a cosponsor of it, but the reason we are here is that criminals find a very easy way of figuring out ways around law, and so I think that experience has shown that child pornographers are especially good at getting around existing legislation. We always have to update it.

You could look at the *Knox* case as an example. In that case, child pornographers thought that they had found some back-door way of getting around the 1986 legislation if children were depicted while they were wearing underwear or a bathing suit. So we in Congress, as we are doing through Senator Hatch's legislation, are revisiting the law and we need to do this from time to time just to make sure that no loopholes have been found. I think that the loophole your bill closes is a very important one.

I think the social science evidence is pretty clear that the viewing of child pornography which looks real can directly cause sexual abuse of children and can also lower the natural reluctance of children to engage in sexual activity. In other words, I think it is clear that child pornography is an instruction manual for child molesters.

You can take the case of the convicted child molester, Richard Burriss, in Los Angeles. According to the May 23 of this year edition of the Daily Breeze, Mr. Burriss electronically manipulated photos of young girls on his home computer. So the problem that your bill, Senator Hatch, addresses is real and it is present. More importantly, it is likely to get worse unless we enact this bill.

I ask that that article and others be placed in the record.

The real issue that we face today is whether or not we are going to enact effective child pornography laws or whether we will let technology create new loopholes in the law. I believe that we must come down on the side of protecting children to the maximum possible extent. Criminals have enough protection already and I don't think they need even more.

I hope at the end of today's hearing, Congress chooses to protect children and not to find a myriad of excuses why we shouldn't give child pornography laws the real teeth that have always been intended over 2 decades of such legislation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Grassley. We will put the articles in the record that you described.

Senator GRASSLEY. Thank you.

[The articles referred to follow:]

LAPD 03.11.5 (1-82)

PRESS RELEASE FORMAT

DR	DATE	TIME
94-1637095	11/11/94	1700

INFORMATION SUMMARY: DO NOT INCLUDE INFORMATION WHICH MAY LATER BE PERTINENT TO THE CASE.

ON NOVEMBER 11, 1994, DETECTIVES OF THE LAPD SEXUALLY EXPLOITED CHILD UNIT RECEIVED TWO CRIME REPORTS FROM FOOTHILL DIVISION. THE REPORTS DESCRIBE A MALE, WHITE IMPERSONATING A COUNTY EMPLOYEE IN ORDER TO INTERVIEW AND EXAMINE VICTIMS OF PHYSICAL AND SEXUAL ABUSE.

IN TWO CASES THE SUSPECT DISPLAYED A STAR-SHAPED BADGE AND PHOTO IDENTIFICATION TO GAIN ENTRY INTO THE VICTIM'S HOME. THE SUSPECT IS DESCRIBED AS A MALE, WHITE, BROWN HAIR, GREEN EYES, 5'10" TALL, 150 TO 230 POUNDS, AND 30 TO 50 YEARS OLD. HE WAS SEEN DRIVING A LATE MODEL, WHITE JEEP OR SUZUKI.

LAPD WARNS THE PUBLIC TO BE AWARE THAT NEITHER LAPD NOR COUNTY CHILD PROTECTION AGENCIES PERFORM PHYSICAL EXAMINATIONS TO DETERMINE SEXUAL ABUSE. All EXAMINATIONS WOULD BE CONDUCTED BY MEDICAL PERSONNEL IN A MEDICAL SETTING.

THE LAPD AND DEPARTMENT OF CHILDREN SERVICES ARE COORDINATING A JOINT INVESTIGATION. IF ANYONE HAS ANY INFORMATION THAT WILL IDENTIFY THIS SUSPECT, PLEASE CONTACT LAPD AT 213-485-2883 OR 213-485-2504.

CONTINUE ON REVERSE SIDE IF NECESSARY

INVESTIGATORS ASSIGNED
1. DETECTIVE RAUL GALINDO #14122
2. OFFICER ROSE FERRUFINO #24715
SUPERVISOR MAKING RELEASE LT. V. KING #17565

PRESS NOTIFICATIONS

SAN FERNANDO VAL

Man denies charges of child molestation

Caseworker ploy used, officers say

By Denis Wolcott
Daily News Staff Writer

A former Palmdale community activist pleaded not guilty Tuesday to charges that he molested a child after posing as a Department of Children's Services worker to gain access to the child's Pacoima home.

Police say Richard Burriss, 47, flashed a collector's-style "star-shaped" badge and a homemade identification card at several homes in the neighborhood, including the one where the molestation occurred.

"Unfortunately, there's been a lot of people like him out there, using false ID badges to gain entry into homes," Detective Raul Galindo of the Los Angeles Police Department said Tuesday. "People need to look closely at them and when they're not sure, call 911."

Burriss pleaded not guilty Tuesday in Los Angeles Municipal Court on five counts of performing lewd acts on a child, one count of attempted lewd acts on a child, and two counts of burglary with intent to commit a felony, records show.

Judge Craig Veals agreed with the District Attorney's Office's request to increase Burriss' bail from $800,000 to $1 million, said District Attorney's Office spokeswoman Sandi Gibbons.

Detective Rosibel Ferrufino said a higher bail was sought because Burriss was considered a flight risk.

In a previous case, Burriss was sentenced to probation in 1990 after pleading guilty to misdemeanor battery in return for child molestation charges being dropped.

El Monte police also said they are investigating whether Burriss is a suspect in as many as 20 sexual assaults over the past year in that city in which the suspect pretended to be a social worker, child-abuse investigator or state official.

Glendale police said they have dismissed Burriss as a possible suspect in five similar cases involving a man posing as a social worker or investigator.

It was through Glendale's investigation and an anonymous tip to the "We-Tip" hot line that LAPD detectives became aware of Burriss as a possible suspect in the Pacoima incidents, police said.

Family members from one Pacoima house later picked Burriss from a photo lineup, Galindo said. Burriss was arrested Friday at the Northridge pharmaceutical company where he works as a computer analyst.

The Pacoima incidents occurred the evening of Nov. 9 at three homes within two miles of each other, Galindo said.

Burriss claimed to be a county official investigating reports of sexual and physical abuse and that he was required to examine the child physically, police said.

Burriss flashed one of the badges he owned from a Franklin Mint collectors' edition of historic badges, detectives said.

"These badges said things like 'ranger' or 'marshal' on them, like what the Old West cowboys would wear," Galindo said.

The identification card was designed and produced on a computer, then laminated, he said.

At the first house, a baby-sitter refused to let Burriss inside, Galindo said. At the second, Burriss managed to talk his way in, but soon was asked to leave. Detectives said Burriss was successful the third time involving a 6-year-old girl.

Richard Burriss
Bail increased to $1 million

"He's very coercive. He'd said that if he was not allowed to examine the child, the child would be taken into custody and it would take 45 to 90 days before a hearing was held to see whether the child could be returned," Galindo said.

In 1989, Burriss was charged with molesting a 5-year-old girl and her 6-year-old sister while they visited with his daughters at his home in January 1988.

The charges forced Burriss, a community activist and former Ventura County sheriff's reserve deputy, to drop plans to run for the Palmdale City Council.

His first trial ended in a mistrial. Before the second trial began in 1990, Burriss agreed to plead guilty to misdemeanor battery in exchange for dropping the child molestation charges. Burriss was sentenced to three years' probation.

At the time of his arrest Feb. 4, 1988, Burriss was president of the Joshua Hills Homeowners Association, vice president of the Palmdale Community Association, and a member of the city's General Plan Advisory Committee.

Daily News

TUESDAY, MAY 7, 1996

Lewd conduct trial opens; Glendale girl takes stand

By Janet Gilmore
Daily News Staff Writer

Even after the man identified himself as a police officer and her parents allowed her to be questioned about neighbors' claims that she had been abused, the Glendale girl said she was wary.

"I thought he was going to hurt me," the girl, age 9, testified Monday in Superior Court.

She said the man asked her age, the name of her school and whether she had ever taken a shower with family members. With her parents standing outside her bedroom door, she said she cried as he instructed her to undress.

The girl was the first witness in the trial for Richard Burriss, a former Palmdale community activist, facing 11 felony counts accusing him of committing lewd acts with the girl, and attempting to commit lewd acts on two children from Pacoima, all in 1994.

Authorities contend Burriss presented himself as a Department of Children's Services worker to gain access to children, telling their families he needed to privately check the child for signs of abuse.

During opening statements Monday, his attorney told jurors that Burriss, 51, impersonated a DCS worker to expose how false abuse claims could destroy lives.

"He became completely obsessed with the department," said Michael Ooley, a deputy public defender. "In his own mind he created a plan to discredit and possibly destroy that department. . . . It was his intention to create a sense of outrage."

Ooley said his client became obsessed with the agency after it began investigating him for child molestation in 1986. The allegations came as the Palmdale man was considering a run for the City Council.

Though he fought the allegations, Ooley said, the charges ended his political plans and, after a jury failed to reach a verdict, he pleaded no contest to two reduced charges of misdemeanor battery.

Prosecutor Susan Powers told jurors that in addition to the eyewitness accounts, police found computerized photographs that Burriss allegedly had taken of the little girls.

Burriss, who once worked as a computer analyst for a Northridge pharmaceutical company, also purportedly used computers to design a fake identification card to pose as a child abuse investigator, officials said.

Man admits posing as investigator

By Janet Gilmore
Daily News Staff Writer

A Palmdale man acknowledged in court Wednesday that he posed as a child abuse investigator and went to the homes of randomly selected young girls and told them to disrobe.

Richard Burriss, testifying in his trial on felony lewd conduct charges, also said that he took various pictures of one girl who was disrobed, and made copies of the pictures.

But he maintained that none of his actions was driven by a desire for sexual gratification.

Prosecutors have charged Burriss with 11 felony counts, accusing him of committing lewd acts with a 7-year-old Glendale girl, and attempting lewd acts on two Pacoima girls. The incidents occurred in 1994.

Burriss, a 51-year-old former computer analyst, testified that he did not touch the girls sexually and was not aroused by them.

His testimony contradicts the testimony of one of the alleged victims and the mother of another.

Burriss, dressed in a dark gray jacket and gray-blue tie, sat stoically as he testified that his encounters with the girls were for the purpose of gathering data he would use to create a public outrage over how the Department of Children's Services investigates abuse claims.

During opening statements, Burriss' attorney contended that his client became obsessed with the department after it investigated him for child molestation in 1986.

Burriss initially had fought those allegations but eventually pleaded no contest to two reduced charges of misdemeanor battery.

:45 FROM LAPD JUV DIV TO 12622281903

Suspected Child Molester Says He Picked His Victim at Random

From The Associated Press

An accused child molester testified Friday that he randomly chose a Pacoima home where he posed as a Department of Children's Services investigator.

Richard Burriss, 51, a computer analyst from Palmdale, is on trial in Los Angeles Superior Court on 11 counts of molesting young girls in the Pacoima area.

He said he took a wrong turn off the freeway, found the home by accident and then returned several days later on March 21, 1994.

"In my travel, at a stop sign, I saw children playing in front of [an apartment]," he testified.

When Burriss returned to the apartment, he posed as a child abuse investigator, flashing a fake badge and homemade identification to the parents of a 7-year-old girl and telling them he wanted to speak to her alone.

The child, now 9, testified last week that Burriss took her to a bedroom, told her to take off her pants and underwear and lie on the bed. Then he fondled her, she said.

The girl's mother said she called police two hours after Burriss left. The family did not identify Burriss from police photographs that day, but later recognized him from television reports when he was arrested in connection with a similar incident in Pacoima.

Deputy Public Defender Michael Ooley argued that his client isn't a child molester, but a man who holds an "irrational" grudge against the Department of Children's Services after it investigated him for child abuse in 1988.

Burriss fought the charges, but eventually pleaded no contest to misdemeanor battery and was sentenced to three years probation.

Ooley said the case destroyed his client's aspirations to become a local politician and that he "considered himself a victim of child abuse laws."

Burriss is being held on $1 million bail.

L.A.TIMES 5-23-96

Man Convicted of Molestation

A Los Angeles Superior Court jury Wednesday convicted a 49-year-old Palmdale man of molesting children while posing as an employee of the county's Department of Children's Services, a prosecutor said.

It took one day of deliberation for jurors to find Richard Russell Burris guilty of 11 felony counts, for which he could be sentenced to a maximum of 21 years in prison, Deputy Dist. Atty. Susan Powers said.

Burris told parents he was a children's services worker investigating child-molestation complaints and needed to examine their daughters in private, Powers said.

He molested a 6-year-old Glendale girl and a 7-year-old Pacoima girl before being caught, Powers said. Burris carried a forged Department of Children's Services identification card and preyed upon immigrant children who knew little of the county bureaucracy, she added.

"He's very, very dangerous," Powers said.

Sentencing was scheduled for June 18.

The Daily Breeze May 23, 1996 REG

Man who posed as investigator convicted of child molestations

By Janet Gilmore
LOS ANGELES DAILY NEWS

Jurors have convicted a Palmdale man who molested little girls while posing as a child-abuse investigator.

Richard Burriss, 51, faces up to 21 years in prison when he is sentenced next month.

"The term 'sexual predator' was used several times back in the jury room," juror Marcus McNeal said outside court Wednesday. "I believed all along that we were dealing with a classic pedophile."

During his Superior Court trial, prosecutors accused Burriss of committing lewd acts on a 7-year-old Glendale girl, as well as lewd acts and an attempted lewd act on two little girls from Pacoima in 1994.

Burriss would enter the children's homes by telling parents he had to examine the girls for signs of abuse.

Burriss testified that he did not touch the girls sexually and did not have the criminal intent required to be guilty as charged.

He maintained that he was once falsely accused of molestation years ago and was on a crusade to expose the Department of Children's Services investigative practices — hoping his drop-in strip searches would create community outrage against the department.

Jury foreman Lee Auerbach said the panel did not believe Burriss had to actually touch the naked girls to make his point if that was his sole intent.

Further, Auerbach said, jurors found criminal intent in the form of pictures Burriss had taken of the girls, electronically manipulating the photos on his home computer to switch faces and body parts among pictures of little girls.

"All of that suggested that he had a prurient interest in little girls," the foreman said.

Burriss' public defender, Michael Ooley, said his client had a difficult hurdle to overcome in that any parent would think that Burriss's conduct was reprehensible, whether or not he had the legally required criminal intent.

Prosecutor Susan Powers, meanwhile, expressed satisfaction with the 11-man, one-woman jury and its verdict: "I think that it will take a serious predator off the streets," she said.

Burriss, a former computer analyst, was active in community affairs many years ago in Palmdale and even had taken out papers to run for City Council. Back then, an investigation into child molestation ended those plans and resulted in a plea to a lesser misdemeanor charge.

The CHAIRMAN. Senator Feinstein has kindly agreed to put her statement in the record and we will put it in the record at this point.

[The prepared statement of Senator Feinstein follows:]

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

INTRODUCTION

Mr. Chairman, there are few crimes more abhorrent than the sexual exploitation of the most trusting and most vulnerable members of our society: our children.

Let us not underestimate the magnitude of this problem:

• According to the Justice Department, there are currently more than 250 investigations of child pornography underway at this time by agents of the Postal Inspection Service, Customs Service and the Federal Bureau of Investigation; and

• In the past three years, United States Attorneys have obtained 757 convictions for crimes involving child pornography, child sexual abuse and violations of the Mann Act.

That's over 1,000 cases involving child pornography or sexual exploitation of children since 1992.

Yet, we cannot lose sight of the fact that hidden within these numbers are innocent children whose lives were altered forever by the sickness of child pornography and child sexual abuse.

I am always distressed by news accounts of child pornography and child sexual abuse cases. I find it most troubling that although the fates of child abusers and pornographers are exhaustively reported, little is said about their youthful victims. No mention is made of the emotional and physical scars left on the victims of these reprehensible crimes, but what happens to a child who is used as an object to satisfy the detestable sexual desires of a sick adult? What happens to a child whose life is altered beyond comprehension through no fault of their own by the most horrendous of crimes?

What will become of the 7-year old Indiana girl who was photographed and videotaped in sexually explicit poses by friends of her mother—one of whom was a paroled child molester? This innocent child was videotaped nude or exposing herself at the direction of the man and his girlfriend and made to film them as they exposed themselves to the camera.

What will become of the three young people—two girls and a boy—who were molested over a 10-year period by Leroy Simon of Kildeer, Illinois? The 64-year old man was recently sentenced to 42 years in jail for videotaping sex acts with these children which prosecutors in the case called "horrendous, despicable, disgusting and ugly."

Just last week, in my own state of California, two men were indicted for possessing and reproducing materials for computers that show children engaged in various sexual acts and poses. The indictments are part of a nationwide undercover investigation by the FBI called "Innocent Images" which targets users of the computer service America Online who use this technology to traffic in child pornography.

Clearly, too many children are sexually abused and exploited by child pornographers. I strongly believe that immediate and comprehensive steps must be taken to stop these criminals before more kids suffer the tragic effects of their monstrous crimes.

I want to commend both the Clinton Administration and Senator Hatch for the steps they have taken to strengthen our laws to combat child pornography. It is important for Congress to do everything we can to support this fight.

I am aware that the First Amendment, as interpreted by the Supreme Court, imposes limits on what we can do in this area. But I think it is important for us to push the envelope of what is permissible. To my mind, the protection of children deserves a far greater priority than does the "free speech" right of someone to satisfy their prurient longings involving children.

CONCLUSION

Mr. Chairman, right now too many children fear for their safety and too many children suffer physically and emotionally from their victimization and sexual exploitation at the hands of child pornographers.

I look forward to discussing with each witness what steps we can take to prevent and punish this exploitation.

Thank you, Mr. Chairman.

The CHAIRMAN. On our first panel, we will hear first from Kevin Di Gregory, Deputy Assistant Attorney General of the Criminal Division of the U.S. Department of Justice, here in Washington. Together with Mr. Di Gregory on this panel is Mr. Jeffrey Dupilka, Deputy Chief Inspector for Criminal Investigations of the U.S. Postal Inspection Service, here in Washington, DC.

So we are happy to welcome both of you to the committee. I will ask that opening statements be limited to approximately 5 minutes. We will also limit rounds of questions to 5 minutes, and I hope we can follow that, since we have a number of witnesses here today.

We will start with you, Mr. Di Gregory. Mr. Dupilka, you can come to the witness table as well. Welcome to both of you. We are happy to have you here and we look forward to hearing your testimony.

PANEL CONSISTING OF KEVIN V. DI GREGORY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND JEFFREY J. DUPILKA, DEPUTY CHIEF POSTAL INSPECTOR FOR CRIMINAL INVESTIGATIONS, U.S. POSTAL INSPECTION SERVICE, WASHINGTON, DC

STATEMENT OF KEVIN V. DI GREGORY

Mr. DI GREGORY. Thank you, Mr. Chairman. Good morning, Senator Grassley. Good morning, Senator Feinstein. Mr. Chairman and members of the committee, I want to thank you for providing the Department of Justice with the opportunity to appear before you today to discuss a matter that is critically important to all of us, the protection of children from sexual exploitation and abuse.

It is difficult to imagine a more repulsive and cruel act, both to the individual involved and to our Nation, than ensnaring a young person in child pornography. It robs the child of his or her innocence and debases our society. We agree, and I, as a father of four, Senator Hatch, agree with you that we have both the constitutional right and the moral obligation to protect our children from those who would abuse, exploit, and degrade the weakest and most vulnerable members of our society.

This administration has carried on the Federal Government's longstanding bipartisan resolve to investigate, prosecute, and punish child pornography as aggressively as possible. That effort has moved forward to include tough action against the trafficking and distribution of those materials by computer.

Since 1993, we have moved to a more proactive stance and carried out the first national investigative effort targeting the importation of child pornography by computer in the United States. This operation, implemented by U.S. attorneys in conjunction with the U.S. Customs Service and overseen by the Child Exploitation and Obscenity Section of the Department of Justice's Criminal Division, was called Operation Long Arm. That successful effort resulted in the execution of search warrants in Federal districts throughout the United States and, to date, more than 20 convictions, with additional cases still being litigated today.

More recently, a second and much larger investigation, called Innocent Images, was coordinated by the Justice Department's Child Exploitation and Obscenity Section and a specialized unit of agents from the Baltimore Office of the Federal Bureau of Investigation. In this effort, more than 150 search warrants were executed throughout the United States in August and September 1995, and already 27 convictions have been obtained and, I believe, no acquittals. In both Operation Long Arm and Innocent Images, the U.S. attorneys took the lead in prosecuting the cases developed as a result of the investigative effort.

Mr. Chairman, the record shows that our focus on aggressive prosecution of child pornography is working. We are taking these despicable predators off the streets and off their computers at unprecedented rates. Here are a few of the statistics covering the past fiscal year.

Federal investigative agencies presented more child pornography cases in 1995 than in any previous year. U.S. attorneys declined a lower percentage of those cases in 1995 than in any previous year. Fiscal year 1995 saw the highest conviction rate for child pornography cases—97.6 percent.

On the legislative front, we have worked with the Congress in a bipartisan manner to identify weak spots in the law and to strengthen them. Last year, as you know, both Houses of Congress unanimously approved, and the President signed into law, a bill increasing the penalties for crimes involving child pornography and prostitution. Today, Mr. Chairman, we are here to discuss our mutual efforts to ensure that our child pornography laws keep pace with technology so that the computer benefits and uplifts our children and our society rather than becoming a tool for their victimization.

As you know, last week, after several months of discussion between the Department and congressional staff, the Department formally transmitted to the Congress our child protection initiative. This bill would prohibit the production of computer-generated and other technologically created child pornography that uses recognizable children.

In addition, it would expand the jurisdictional basis of current child pornography laws to cover offenses that make use of a facility of interstate or foreign commerce, such as a computer network that uses telephone lines. The bill would also direct the U.S. Sentencing Commission to increase sentences applicable to sexual abuse involving children under 12 years of age.

In addition, the bill would extend the reach of a current provision that allows alternatives to live in-court testimony by children in certain circumstances. Finally, it would require providers of electronic communications services or remote computing services to report suspected child abuse to authorities.

Mr. Chairman, your bill, S. 1237, is timely in several ways. First, it seeks to address vexing problems that we have encountered in the course of our aggressive effort to pursue individuals who misuse computer technology to exploit children. Second, it comes amidst a resurgence in the distribution of child pornography and materials which feed pedophile appetites. Third, it seeks to head off

current trends in child sexual exploitation before those trends become entrenched.

My comments and our proposal are intended to strengthen S. 1237. As we have previously stated in a "views" letter on your bill, we believe that your introduction of that bill provides an excellent opportunity to make substantial changes and additions to the Federal child pornography laws in order to enhance the Government's ability to stop the exploitation of child through the traffic in child pornography. We look forward to working with you and other members of this committee to pass legislation that is as tough and effective as possible.

Mr. Chairman, this concludes my oral statement and I have submitted for the record a more detailed written statement that addresses the specific provisions in your bill and offers some suggestions on how the legislation might be strengthened. I would be happy to answer any questions that you or the other members of the committee might have and I thank you.

The CHAIRMAN. Thank you so much, Mr. Di Gregory. We appreciate your excellent statement and the administration's support, and we will work together to make sure this bill is as perfect as we can make it.

[The prepared statement of Mr. Di Gregory follows:]

PREPARED STATEMENT OF KEVIN V. DI GREGORY

Mr. Chairman and members of the Committee: I want to thank you for providing the Department the opportunity to appear before you today to discuss a matter that is critically important to all of us: The protection of children from sexual exploitation and abuse. It is difficult to imagine a more repulsive and cruel act—both to the individual involved and to our Nation—than ensnaring a young person in child pornography. It robs the child of his or her innocence and debases our society. We agree wholeheartedly with you, Mr. Chairman, that " * * * we have both the constitutional right and moral obligation to protect our children from those who * * * would abuse, exploit, and degrade the weakest and most vulnerable members of our society."

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Mr. Chairman, the record shows that our focus on aggressive prosecution of child pornography is working. We are taking these despicable predators off the streets—and off of their computers—at unprecedented rates. Here are a few of the statistics covering the past fiscal year in comparison to the previous decade:

- Federal investigative agencies presented more child pornography cases in FY 1995 than in any previous year.
- U.S. Attorneys declined a lower percentage of cases in FY 1995 than in any previous year.

• The year-to-year increase in child pornography cases filed was higher than in any year since 1986.
• FY 1995 saw the highest conviction rate for child pornography cases—97.6%.

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As you know, last week, after several months of discussion between the Department and Congressional staff, the Department formally transmitted to the Congress our Child Protection Initiative. This bill would prohibit the production of computer generated and other technologically created child pornography that uses recognizable children. In addition, it would expand the jurisdictional basis of the current child pornography laws to cover offenses that make use of a facility of interstate or foreign commerce, such as a computer network that uses telephone lines. The bill would also direct the U.S. Sentencing Commission to increase sentences applicable to sexual abuse involving children under twelve years of age. In addition, the bill would extend the reach of a current provision that allows alternatives to live, in-court testimony by children in certain circumstances. Finally, it would require providers of electronic communication services or remote computing services to report suspected child abuse to authorities.

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My comments and our proposal are intended to strengthen S. 1237. As we have previously stated in a "views" letter on S. 1237, we believe that your introduction of that bill provides an excellent opportunity to make substantial changes and additions to the federal child pornography laws in order to enhance the Government's ability to stop the exploitation of children through the traffic in child pornography. We would like to work with you to make this bill as effective and enforceable as possible.

Section 3 of S. 1237 would prohibit two types of conduct, neither of which is addressed under current federal law. First, it would bar individuals from using images of real children who are made to look as if they were engaging in sexually explicit conduct even if they were not so engaged. A simple example of this would be a visual depiction in which a picture of an actual child's head is joined with a picture of an adult's body to create a new picture in which the child is depicted as engaged in sexual conduct.

Second, the legislation would prohibit the production and dissemination of material which appears to depict actual children engaged in sexually explicit conduct but which was not created by using an actual child or an image of an actual child. An example of this second type of depiction would be an artist's rendering, or a computer-generated picture, which depicts a purely imaginary child engaged in sexual conduct.

Pedophiles have created and used altered or doctored images for a long time. In the past these images have run the gamut from magazine cutouts crudely assembled with photographs of children from the pedophile's neighborhood, to artfully rendered collages which have been painstakingly assembled and then rephotographed so that only careful inspection reveals the image as false.

But what has always been the case in the past—that the images were readily revealed as false with careful inspection—may no longer be true, as image-altering software and computer hardware are used to create altered images which appear all too real of children engaging in sexual activity. Soon it will not be necessary to actually molest children to produce child pornography which exploits and degrades them—and which can be used to further actual abuse. All that will be necessary will be an inexpensive computer, readily available software, and a photograph of a neighbor's child shot while the child walked to school or waited for the bus.

In addition to our expectation that this material will pose serious problems in the future, we have already been confronted with cases in which child pornographers attempted to use the gap in existing law as a legal defense. For example, in the first-ever federal trial involving charges of importation of child pornography by com-

puter, *United States* v. *Kimbrough,* 69 F.3d 723 (5th Cir. 1995), the defendant offered evidence that currently available computer programs could be used to alter a photograph of an adult so that it looked like a photograph of a child. From that evidence, the defense then argued that the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor rather than an adult made to look like one, and that the defendant should be acquitted if the government did not meet that burden.

In that case, the defense was overcome through a carefully executed cross-examination and production, in court, of some of the original magazines from which the computer-generated images were scanned. But it is also true that in 1993, when the *Kimbrough* case was tried, the technology was still at an early stage of development and as such, the defense was not as potent as it might become in the future. Moreover, magazine archives will be of less value to prosecutors since child pornography produced today will no longer predate the availability of graphic imaging software. Thus, the Government will no longer be able to produce the original child pornography magazine against which a comparison may be made.

Images in the first category I have described—those that use actual photos of recognizable children to depict those children engaging in sexual activity—are highly exploitive and degrading, violating the privacy and innocence of children and creating images which will forever circulate in cyberspace, humiliating those children for years to come. Realistic alterations and "artificial" child pornography that are now readily available through the use of computers can present a real threat to children even though they do not depict actual children engaged in sexual conduct. Just as the government has a compelling interest in suppressing "real" child pornography because it "permanently record[s] the victim's abuse," *Osborne* v. *Ohio,* 495 U.S. 103, 111 (1990), the government also has a compelling interest in stanching the availability of "falsified" sexual images of real children, because the "continued existence" of such images will cause harm to the children depicted "by haunting the children in years to come." *Id. See also New York* v. *Ferber,* 458 U.S. 747, 759 & n.10 (1982). Even more ominously, pedophiles might use such "doctored" images to blackmail children into silence or sexual abuse.

Entirely artificial images present their own dangers: They can be used to enhance pedophile fantasies which may encourage acting out, and, more dangerously, can be used by pedophiles to seduce children who might be vulnerable to the suggestion that the images represent a fun and worthwhile activity. Therefore, the increasingly widespread creation and use of such images represents a growing phenomenon and danger that needs to be addressed, as well.

The Supreme Court and the lower courts to date have not definitively resolved the question of whether the government may protect children generally where the sexually explicit material it seeks to ban does not involve recognizable minors, but merely images which appear to be those of children engaged in sexual activity. The Department supports your effort to address this issue because we are convinced that this material represents a grave risk to children and is primarily designed to feed pedophile lusts. We believe that such a prohibition would be found constitutional. You should be aware, however, that there is language in *Ferber* that, while dicta, could be used by defendants to argue that wholly artificial material that depicts fictional children in sexual situations stands on a different footing from material that depicts actual children. For example, the Court said in *Ferber,* 458 U.S. at 764-65, "we note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."

We believe that regulation of such material would survive such a challenge, both because the material should be considered unprotected speech and because the government has a compelling interest in protecting children from being depicted as sexual objects. However, because the issue has not been definitively resolved by the courts, and because the pace of technology makes this aspect of the problem ever more threatening, we recommend adoption of an additional tool, over and above what is already proposed in the legislation, to combat child pornography that does not depict any actual children.

In particular, in order to assure that these horrible criminals are punished, I would like to urge an additional means of addressing the issue of artificially created child pornography: singling out material which is wholly "artificial," and that does not depict an actual child, but that nevertheless is sexually exploitive of children generally, for more severe punishment within the federal obscenity framework under Chapter 71 of Title 18. This proposal would put a new statutory tool to deal with artificially created child pornography on the firmest possible constitutional footing. Specifically, we urge you to consider significantly increasing the penalties for the production, possession, and distribution of obscene material where the sub-

ject matter involves children. Obscenity is not protected by the First Amendment, and therefore it is entirely permissible to increase the penalties associated with those forms of obscenity—like child pornography—that cause the greatest harm. This is the approach the Sentencing Commission has taken with regard to, for example, obscenity depicting sadism and masochism. *See* Sentencing Guidelines §2G3.1(b)(2). We think the same approach is appropriate here, and that you should put this additional tool into the hands of prosecutors.

It is our belief, based on recent investigative and prosecutive initiatives undertaken by the FBI, U.S. Postal Service, and U.S. Customs Service, that such an obscenity-focused approach would enable us to effectively prosecute the worst types of "artificial" child pornography.

In one of those investigative efforts, the recently announced "Innocent Images" project, the FBI targeted users of a major national on-line computer service who were trafficking in child pornography. The trafficking in child pornography by computer users has, in some ways, challenged the progress of nearly eight years of aggressive child pornography investigation and prosecution. Whereas by the early 1990s the Government had largely eradicated the cottage trade within the United States for this material and distribution was typically limited to trading or sharing between individual pedophiles who actually knew each other, today computer technology has reinvigorated both the commercial and non-commercial distribution of obscene child pornography. This reinvigoration means that child pornography produced in the 60s, 70s, and early 80s is now being re-released and distributed to an audience, the size of which pedophiles could not have envisioned ten or twenty years ago. Additionally, the ability to mass market child pornography with little or no overhead to huge populations has created an environment where pressures for new material exist. This demand, unfortunately, is being met by new material from sources which include the Pacific Rim, Mexico, and South America.

Our investigation has also resulted in the discovery that substantial amounts of written obscenity containing graphic descriptions of torture, bondage, and rape of children are being posted and distributed on the Internet and on private on-line systems.

As the World Wide Web, which is a major graphics component of the Internet, continues to grow, we expect that obscene visual images consisting of fantasy drawings or computer-generated images featuring similar themes of child sexual and physical abuse will also be created and made available for distribution. Obscene material, both written and visual, which can be used to seduce, lure, or train children to perform certain acts, must be highlighted and punished differently. We urge you to consider sentencing changes for such material.

We would like to work with you to make some other more technical changes. Section 4 of the proposed bill changes the structure of the sexual exploitation of children statutes, found at 18 U.S.C. §§2251-2258; alters the definition of the kind of visual depiction a person is prohibited from distributing or receiving; and applies the new definition to certain existing sections. Presently, the statutes do not use the term "child pornography;" rather, the prohibited conduct centers on visual depictions of the sexual exploitation of children. Since not all existing statutory sections would be amended, certain anomalous results would occur as different definitions would apply in related statutory sections. We would like to work with your staff to avoid any such unintended consequences.

Section 4 also makes a helpful improvement to the possession statute, proposed 18 U.S.C. §2252(a)(5), by including "computer disks" in the list of items containing child pornography that are illegal to possess. We suggest a minor modification, however.

The existing statute (18 U.S.C. §2252(a)(4)) proscribes possession of three or more books, magazines, photographs, or other items that contain child pornography. Ordinarily, therefore, if a defendant possesses three or more photographs depicting child pornography, he has violated the statute. Computer disks are capable of storing hundreds of visual images of child pornography, however. To prove a violation of the proposed possession statute, we would have to demonstrate possession of three or more computer disks, each containing (at least potentially) hundreds of photographs depicting child pornography, while we could obtain a conviction upon a showing of possession of only three or more photographic prints. This result is obviously unintended and undesirable. Another approach would be for the statute to prohibit knowing possession of "three or more visual depictions that are contained in books, magazines, periodicals, films, videotapes, computer disks, or any other material that contains any visual depiction."

In conclusion, Mr. Chairman, as you stated when you introduced S. 1237 on September 13, 1995, "Child pornography * * * is a plague upon our people and the moral fabric of this great Nation." Moreover, you recognized that the "[c]urrent fed-

eral law dealing with child pornography reflects the overwhelming bipartisan consensus which has always existed, both in Congress and in the country, that there is no place for such filth even in a free society." Given those truths, we embrace your intention to "close th[e] computer generated loophole and to give [] law enforcement authorities the tools we need to stem the increasing flow of [this material]." We look forward to working with you toward meeting that goal.

The CHAIRMAN. Mr. Dupilka, we will take your testimony at this time and then we will have some questions.

STATEMENT OF JEFFREY J. DUPILKA

Mr. DUPILKA. Thank you, Mr. Chairman, Senator Grassley, Senator Feinstein. I am Jeffrey Dupilka, Deputy Chief Postal Inspector for Criminal Investigations. We appreciate the opportunity to participate in this hearing concerning your legislation to update the Federal sexual exploitation of children statutes. We commend you for focusing attention on this extremely important issue.

As you know, the Postal Inspection Service is the law enforcement arm of the Postal Service. We have had specific responsibility for investigating the mailing of obscene material for over a century. Until 1977, child pornography was investigated under what is referred to as the obscenity statutes. Since the enactment of the Child Protection Act, postal inspectors have conducted over 2,700 pornography investigations resulting in the arrest and conviction of more than 2,400 pedophiles, many of whom were also child molesters.

Child pornography is not an art form. It is documented evidence of sexual molestation and abuse and the continuing victimization of children. These materials graphically depict children, sometimes as young as 2 years of age, engaged in a variety of sexually explicit activities, captured in full color, displayed in magazines, on slides, in photographs, on film, videotape, and now in picture-quality computer images.

Who are the victims? There is a popular notion that runaways and children from broken homes are the main targets of pedophiles. We have found otherwise. In many cases, the victim is the child down the street, seduced into a relationship by a trusted adult who then hides the fact because of the guilt, shame, or in some instances because for the first time in the child's life they have received attention from what is interpreted to be an affectionate adult.

Child molesters use kiddie porn to seduce children into participating in sexual activity with them, often visually documenting this assault. Once the pedophile seduces the child, he may use the pornography to blackmail the child into a continuing relationship or to keep their secret from others. The pornographer also exchanges the materials with other pedophiles, victimizing the child again and again.

Due to public outcry and a series of well-publicized incidents involving child exploitation and abuse, State and local enforcement efforts have been able to all but eliminate the over-the-counter sale and viewing of child pornography. Child pornographers and pedophiles turned to the U.S. mail and more recently to computers to traffic in this insidious material because they can correspond, buy, sell, and remain somewhat anonymous.

Of late, it has become common for law enforcement authorities to seize personal computers and related materials that are used to store data bearing on the identities of other pedophiles. Recent investigations, however, have revealed that pedophiles employed personal computers for purposes extending far beyond the mere storage of data. They are using them to carry out private conversations with persons of similar proclivities, communicating their sexual interest in and activities with children. Even more alarming, many pedophiles are now using the computer to carry out private conversations directly with children, sometimes successfully persuading the child to meet them and engage in sexual conduct with them.

Today's technology has given the cyber pedophile the ability to quickly and efficiently convert photographs and video images into digital files that can easily be stored on floppy disks, hard drives, and CD–ROM's like this one which was seized in a case we worked in New Jersey. Personal computers make it possible to electronically transfer picture-quality images at the touch of a button. Technology also allows for easy alteration of images. Using morphing software, faces and bodies can be easily interchanged, allowing for yet another twist to the sexual exploitation of children.

Often, when we conduct searches in our investigations, we find photographs of children who are not involved in sexual activity, photographs taken by pedophiles for their own gratification and photographs containing what we consider erotica. With this new technology, pedophiles can now change these photographs and make the child a victim without ever having engaged in the activity. Your proposed legislation would help us close that gap, Senator.

These laws governing child pornography must be modified so that we as law enforcement officers can continue to fight the battle of child sexual abuse in this ever-changing computer age. This most despicable of crimes, the sexual exploitation of children, is a continuing tragedy that cuts across all social and economic classes that results in physical and emotional suffering, ruined lives, and shattered dreams.

As a civilized society, our goal should be to eradicate child pornography, and in doing so reduce the far too many incidents of child sexual exploitation. Only through public awareness, strong laws such as the one that you suggest, rigorous investigation, certain prosecution, and just sentencing can we hope to reduce this horrible crime. We strongly support your efforts to achieve this goal by strengthening the statues.

Mr. Chairman, I have submitted a more detailed set of remarks for the record and I thank you and the committee for allowing us to present our experiences, concerns, and recommendations, and we would be happy to answer any questions which you may have.

The CHAIRMAN. Thank you so much. It was an excellent statement. All full statements of all witnesses will go in the record, without objection.

[The prepared statement of Mr. Dupilka follows:]

PREPARED STATEMENT OF JEFFREY J. DUPILKA

Mr. Chairman and members of the Judiciary Committee, I am Jeffrey J. DuPilka, Deputy Chief Postal Inspector for Criminal Investigations. I appreciate the opportunity to participate in this hearing concerning your legislation to update the Federal sexual exploitation of children statutes. I commend you for focusing attention on this extremely important issue.

As you know, the Postal Inspection Service is the law enforcement, security and audit arm of the Postal Service. We are one of the oldest federal investigative agencies of the United States. For more than 200 years, we have been investigating crimes against the Postal Service and its customers. We also serve as the Inspector General of the Postal Service with enhanced responsibility to detect and prevent fraud, waste, and abuse. Postal inspectors have statutory authority to serve federal warrants and subpoenas, and to make arrests for postal-related offenses. We enforce over 200 Federal statutes.

We investigate, and seek to prevent, criminal attacks against the Postal Service or its employees and misuse of the nation's postal system. Our investigative responsibilities include such offenses as: armed robberies; murder of, or assault upon, postal employees; burglaries; theft of mail; use of the mails to swindle the public; protection of Postal Service revenues; and mailings of child pornography, obscene matter, bombs, and drugs.

To meet our law enforcement, security and audit responsibilities, we employ over 2,200 postal inspectors, 1,400 postal police officers, and 870 professional, technical, and support employees. Among our inspectors are lawyers, accountants, statisticians, economists, criminologists and members of other professional disciplines. During fiscal year 1995, postal inspectors made 10,920 arrests for crimes involving the mails or the Postal Service.

This most despicable of crimes, the sexual exploitation of children, is a continuing tragedy that crisscrosses all social and economic classes. It results in physical and emotional suffering, ruined lives, and shattered dreams. Child pornography is not an "art form." It is documented evidence of the sexual molestation, abuse and continuing victimization of children. Only through public awareness, strong laws, vigorous investigation, certain prosecution and just sentencing can we hope to reduce this horrible crime.

We have postal inspectors specially trained to conduct child pornography investigations assigned to each of our 29 field divisions nationwide. My own duties include overseeing the development and implementation of the Inspection Service's national strategy to identify and bring to justice those who use the mail to transport child pornography.

Child molesters and child pornographers often seek to communicate with one another through the U.S. Mail because of what they perceive as the security and anonymity it provides. The Postal Inspection Service has had specific responsibility for investigating the mailing of obscene matter for over a century (Title 18, U.S. Code, Section 1461). While over the years child pornography was, as a mater of course, investigated along with the obscenity matters, increased public concern over this material resulted in the U.S. Congress enacting the Sexual Exploitation of Children Act in 1977 (Title 18, U.S. Code, Section 2251-2253). Congress continued to demonstrate its concern and leadership in this area by amending the 1977 Act on four occasions. Since the enactment of the Child Protection Act of 1984, postal inspectors have conducted over 2,700 child pornography investigations, resulting in the arrests and convictions of more than 2,400 child pornographers and child molesters.

During the past several years, the public has become increasingly aware of the proliferation of sexually oriented materials involving the abuse of children. These materials graphically depict children, sometimes as young as two years of age, engaged in a variety of explicit sexual activities, in full-color magazines, slides, photographs, movie films, video tapes, and now, "picture quality" computer images.

Due to public outcry, and a series of well-publicized incidents involving child sexual exploitation and abuse, state and local law enforcement efforts in the United States have been able to all but eliminate the over-the-counter sale and viewing of child pornography throughout the country. Child pornographers and pedophiles first turned to the U.S. Mail and more recently to computers to traffic in this insidious material because they can buy, sell, trade, and remain somewhat anonymous. It is this cloak of anonymity and the compulsive nature of the pedophiles to not only amass greater quantities of child pornography, but also to validate their behavior with others who are similarly inclined, that has given the child pornographer the drive to engage in the mailings which constitute this criminal activity.

Unlike commercial adult obscenity dealers, domestic child pornographers rarely advertise or solicit new business. Their operations are underground and restricted,

in many instances, to dealing with known pedophile customers. In fact, child pornography exists only for the pedophile. A pedophile is defined as one whose erotic imagery and sexual fantasy are focused on children. Pedophiles have an abnormal sexual desire for children; and, as a group, they are the major producers, distributors, and consumers of child pornography.

Child molesters will use "kiddie porn," including private, original and commercial material, to seduce children into participating in sexual activity with them, often visually documenting the assault. Once the pedophile seduces the child, he may use the pornography to blackmail the child into continuing the relationship or keeping their "secret" from others. The pornographer also exchanges the material with other pedophiles.

Who are the victims? There is a popular notion that runaways and children from broken homes are the main targets of pedophiles. We have found otherwise. In many cases, the victim is the child "down the street" who has been seduced into a relationship by a trusted adult and then hides the fact because of guilt, shame, blackmail, or, in some instances because, for the first time in their life, they have received attention and what is interpreted to be affection from an adult.

The notion that pedophiles are lurking in the shadows is also inaccurate: they come from all walks of life. The occupations of some of the offenders arrested in the United States include: doctors, teachers, lawyers, law enforcement officers, clergymen, and businessmen. Many have occupations bringing them into frequent contact with children. Many hold respected positions in their community and have concealed their interest in child pornography for years. The hobbies of offenders include coaching youth sports, dance instruction, leading youth groups, baby-sitting, and amateur photography.

Few crimes, if any, are more heinous and detrimental to our society than the sexual exploitation of children. Through years of investigating this unlawful activity, it has become clear that the most effective means to identify these individuals is through the development and implementation of proactive undercover investigations. Generally speaking, this crime does not come "knocking at your door." It can be said, the easiest way to convince yourself that this criminal activity isn't occurring in your community is quite simple—don't look for it. In case after case, had it not been for the work of law enforcement agencies in the United States and our pro-active undercover investigative efforts, these offenders, arrested for violating U.S. laws, in all likelihood would have never been identified and would still be abusing and exploiting children today and in the future.

Postal inspectors utilize an established, nationwide network of intelligence to implement a wide variety of undercover programs designed to uncover suspects and develop prosecutable cases. These undercover operations recognize the clandestine nature of the targets and the inherent need of many offenders to validate their behavior. The techniques utilized in these programs include placement of contact advertisements in both national and local publications, written contacts and correspondence with the subject, and more recently, contact via computer bulletin boards.

When, during the course of an investigation, sufficient probable cause has been developed to indicate that a suspect has violated the child pornography statutes, a federal search warrant may be sought for the suspect's residence. Execution of search warrants usually leads to the recovery of child pornography, sexually oriented correspondence, and, too often, the identification of child victims.

Recently, one of our most successful child pornography investigations, known as "Project Special Delivery," received significant media coverage. The two-year investigation shut down the largest known commercial distributor of child pornography in U.S. history. The investigation centered on Overseas Male, a company operating from Mexico and San Diego that distributed videos depicting children as young as seven years old engaged in various explicit sexual acts with both adults and other children. One principal of the company was arrested by the U.S. Customs Service during a routine border check in June 1994 and the other was found dead in Mexico, and is believed to have committed suicide.

After the company was shut down, we began investigating the buyers of their product in an effort to cut off the demand for child pornography. To date we have conducted over 133 searches and arrested 49 individuals. Approximately 65 more arrests are anticipated.

To the child pornographer, his collection is one of the most important things in his life. Why else would he risk fines, disgrace, and jail? The child pornographer's collection is never complete; he always has the desire to add to it. To acquire it, he usually uses the U.S. Mail, computer systems, or produces it himself. As he acquires it, he organizes his collection carefully, for he will keep it as long as he can. In most cases, because he knows what he does is illegal, the child pornographer

carefully conceals his collection. Although the pedophile's collection of child pornography is oftentimes "hidden" from the casual observer, it is almost always readily accessible to him, for it is from this collection of child pornography that the pedophile derives his own sexual gratification. Seizing these collections contributes to stopping the victimization.

More recently we have seen a significant increase in computer usage by child pornographers through computer bulletin board networks, commercial computer services and the INTERNET. Today's technology has given the cyber pedophiles the ability to quickly and efficiently convert photographs and video images into digital files that can easily be stored on computer floppy disk, hard drives and CD–ROM disks. Personal computers also make the electronic transfer of picture quality images at the touch of a button and makes "letter writing" much easier. Even though the computer, in some cases, is replacing traditional correspondence, our experience has shown these computer literate child pornographers still rely heavily on the mails to exchange video tapes and computer diskettes containing the child pornography. Use of the mails and computers in the distribution of child pornography perpetuates the sexual abuse and exploitation of the children involved. Pedophiles believe there is nothing wrong with what they are doing, so naturally they are looking for other individuals who support their thinking.

Postal inspectors have already seized child pornography CD–ROM with motion pictures. Technology also allows for easy alteration of the images using morphing and graphic software packages. Faces and bodies can easily be interchanged allowing for yet another twist to the sexual exploitation of children. The laws governing child pornography must be modified so law enforcement officers can continue to fight the battle of child sexual abuse in the ever changing computer age. The availability of child pornography in this country appeared to be declining over the last ten years, but recently that trend has been reversed, due partly to computers and increasing use of worldwide communication through the INTERNET.

Of late, it has not been uncommon for law enforcement authorities to seize personal computers and related materials that are used to store data bearing on the identities of other pedophiles with whom the offenders have been in contact. Recent investigations, however, have revealed that pedophiles employ personal computers for purposes extending far beyond the mere storage of data. They are using them to carry out "private" conversations with persons of similar proclivities in communicating their sexual interest in and activities with children. Even more alarming today, many pedophiles are now using the computer to carryout these "private" conversations directly with children and, oftentimes, are successful in persuading the child to meet with them and to engage in sexual conduct with them.

All branches of the Federal government and all law enforcement agencies need to continue to work together in a cooperative spirit. Our goal should be to eradicate child pornography and in so doing, reduce child sexual exploitation. Only by combining our efforts, resources, and knowledge in a team approach to this hideous crime can we make a difference. We strongly support your efforts to strengthen the statutes.

Mr. Chairman, I would like to thank you and the Committee for the opportunity to present our experiences, concerns, and recommendations regarding the protection of America's greatest and most vulnerable resource, our children. I would be pleased to answer any questions you may have.

LEGISLATIVE HISTORY INFORMATION

The Postal Inspection Service has had specific responsibility for investigating the mailing of obscene matter for over a century (Title 18 U.S. Code, Section 1461). While over the years child pornography was, as a matter of course, investigated along with the obscenity matters, increased public concern over this material resulted in the U.S. Congress enacting the Sexual Exploitation of Children Act in 1977 (Title 18 U.S. Code, Section 2251–2253). Congress continued to demonstrate its concern and leadership in this area by amending the 1977 Act on four occasions.

The Child Protection Act of 1984 (18 USC 2251–2255) amended the 1977 Act by:

- Eliminating the obscenity requirement.
- Eliminating the commercial transaction requirement.
- Changing the definition of a minor from a person under age 16 to one under age 18.
- Adding provisions for criminal and civil forfeiture.
- Amending the federal wiretap statute to include the Child Protection Act.
- Raising the potential maximum fines from $10,000 to $100,000 for an individual and to $250,000 for organizations.

On November 7, 1986, congress enacted the Child Sexual Abuse and Pornography Act of 1986 (18 USC 2251–2256) which amended the two previous acts by:

- Banning the production and use of advertisements for child pornography.
- Adding a provision of civil remedies for personal injuries suffered by a minor who is a victim.
- Raising the minimum sentences for repeat offenders from imprisonment of not less than two years to imprisonment of not less than five years.

On November 18, 1988, the U.S. Congress enacted the Child Protection and Obscenity Enforcement Act of 1988 (18 USC 2251–2256). These amendments:

- Make it unlawful to use a computer to transmit advertisements for, or visual depictions of, child pornography.
- Prohibit the buying, selling, or otherwise obtaining temporary custody or control of children for the purpose of producing child pornography.

More recently, on November 29, 1990, Congress enacted an additional amendment (18 USC 2252), making it a Federal crime to possess three or more pieces of child pornography.

The CHAIRMAN. Now, I am going to ask a question of you, Mr. Di Gregory. It is not meant to embarrass the Administration because the Administration is on both sides of this issue. One side, I think, is wrong; the other side, I think, is right. But I want to kind of go through this because I think it is important for people out there to understand that sometimes our judges are not doing what they really should do.

Let me recount some details about a convicted child pornographer, Michael John Gossens, and just ask you about the case. Gossens had bought much of his child pornography through a computer billboard service. In 1995, Judge Leonie Brinkema, a Clinton appointee, disregarded Federal sentencing guidelines that called for as much as 18 months in jail and granted Gossens 3 years of probation because the defense presented psychiatric testimony that his use of pornography did not threaten others. I understand that the Clinton-appointed U.S. attorney—this is the good side—had sought some prison time for Gossens and, in my opinion, this should be a matter of routine.

On February 19, 1996, local police staked out a recreation center because park officials had received a complaint that a man was spending long periods of time in the showers with young boys. The police saw Gossens go into the shower 5 times in 20 minutes, face the youngsters, and rub their genitals. The police confronted, but did not arrest him. Gossens, however, violated his probation by failing to inform his probation officer within 72 hours that he had been questioned by police. Now, finally, for this probation violation Judge Brinkema has sentenced Gossens to 9 months in prison. That account, of course, is from a March 16 Washington Post article of this year.

You are familiar with this case, I am sure. Did I accurately describe it?

Mr. DI GREGORY. Senator, I am not familiar with that particular case. I am sorry.

The CHAIRMAN. You are not familiar, all right. Well, let me just say this. At his sentencing for the probation violation, and referring to her initial soft-hearted sentence, the Washington Post reported that Judge Brinkema had this to say to Gossens, "You received an incredibly generous sentence. You have been given the option of rehabilitation and that has not happened. At the very least, the defendant's behavior has threatened the psychic safety of children. It is only fortunate that nothing more serious has happened."

The question is, you know, the thing that rises in my mind is she should not have been incredibly generous to this convicted child pornography collector in the first place and should not have let him loose. As I have said before, the Administration's crime policies are a web of several factors, including its philosophy in choosing prosecutors and judges. The prosecutor wanted time for this person. The judge gave an incredibly soft sentence. All the anticrime rhetoric in the world won't matter if judges are appointed who go easy, as Judge Brinkema did, on someone like Gossens.

I take no comfort in the fact that the prosecutor in this case sought some prison time because I consider that routine law enforcement, but there is a Federal prosecutor in Arizona, Janet Napolitano, whose prosecutorial policies in child pornography cases now are raising some very serious concerns, as well, which this committee has to look into. I am hoping that there is no problem there, but the fact is that it looks kind of bad from our preliminary examination of it.

I would like to just ask for your cooperation and help in spreading throughout the Administration that we are going to get tougher on these types of crimes because if we don't, they are going to pervade our society. I have a feeling that you are going to get tougher on these things and you are going to do everything in your power to do that. Am I right on that?

Mr. DI GREGORY. Senator, I have been trying to do everything in my power to do that since 1993 when I came on board.

The CHAIRMAN. I believe you have and I personally appreciate it. I just wanted to mention that because this is a real-life thing that just happened recently.

Mr. Dupilka, I want to commend the Postal Inspection Service for its efforts to combat the plague of child pornography, most recently because of your efforts through Project Special Delivery which resulted in the closing of the largest known distributor of child pornography in the history of our country.

However, I noted in your prepared statement that after nearly a decade of decline, there has recently been an increase in the availability of child pornography, which you attribute in part to the use of computers. You are expecting an explosion here, aren't you, if we don't do something about it?

Mr. DUPILKA. Yes. Unfortunately, Senator, we are. We found in our most recent investigation that there are, as with any other segment of the population, a large number of computers present in the households where we have done searches. By connecting internationally to computer bulletin boards and sources in other countries where the laws are not so protective of the children, people are able to easily import those images, download them onto computers, load those onto floppy disks, mail them, and create videotapes. So we have seen an alarming increase recently and we do expect that without legislation such as this, it will continue to increase.

The CHAIRMAN. Well, these child pornographers are quick to use new technologies, such as videotape, then computers, and now even CD–ROM's that you exhibited here today.

I will turn to Senator Biden.

Senator BIDEN. Gentlemen, I thank you for being here. I think you are doing one heck of a job.

The CHAIRMAN. I do, too.

Senator BIDEN. I have been here for 23 years and I know of no department that has been more aggressive than yours. Your conviction rates are incredibly high. You have brought more child pornography cases in 1995 than any previous year and you have declined a lower percentage of child pornography cases in 1995 than any previous year, and I compliment you on your commitment. More importantly, I compliment you on your success, both of you; different aspects of our enforcement, the Postal Service and U.S. attorneys, but equally important.

Rather than ask you the prepared questions I have, which I will submit in writing, if I may, Mr. Chairman——

The CHAIRMAN. Sure.

Senator BIDEN. I would like to ask you to give us, if you could, a thumbnail, each of you, of where are the most blatant gaps. Now, I am not looking for a legal analysis at this point. What I am looking for is what is the nature of the problem and where are there gaps. As the Chairman said and you pointed out, sir, these pornographers are very innovative. I mean, they are doing everything from morphing faces of children so these weirdos get their kicks while they are trying to get around the law, to the way in which they are distributing this pornography.

Where are the gaps? If you had to summarize, give us some examples of the kinds of things you are seeing. What is coming across your desks that you want to move on and maybe can't because there is a gap?

Mr. DI GREGORY. Senator, I think the most significant gap is a gap which is addressed both by the Department's child protection initiative and by Senator Hatch's legislation, and that is a gap dealing with the, if I can use the word "morphing" on computers, which is a process which allows people who want to traffic or who want to trade this child pornography via computer or who simply want to have it, in one example, to take the head of a real child and put it on the body of an adult, or perhaps what is more pervasive—and Jeff may agree with me on this—putting the head of one child on the body of another child. Currently, if we want to prosecute——

Senator BIDEN. For the record, what is the purpose of that? If it is a child, it is a child.

Mr. DI GREGORY. The purpose of that is to evade the Federal law, one of the purposes is, because currently unless the depiction that results is obscene and we can prosecute it using the *Miller* test, we can't go after that particular type of child pornography.

Senator BIDEN. I know the answer to these questions, but I want them on the record.

What law are they avoiding if they took a child's body and had the child engaging in pornography and put a different child's face on that body? Isn't that a violation of the law as it stands now if it is a child's body, if a child is being engaged in the pornography, as opposed to taking an adult's body and putting a child's head on an adult's body?

Mr. DI GREGORY. I believe they can also skirt the law, Senator, by putting two different parts of children together.

Senator BIDEN. OK, but I interrupted you, so you are saying the gap exists because in order to nail them for that, you have to proceed under the *Miller* standard. You have to prove obscenity, which is a harder standard.

Mr. DI GREGORY. Right.

Senator BIDEN. If it is a child, a child is a child, and you avoid having to go to that level.

Mr. DI GREGORY. Right.

Senator BIDEN. For laypersons, you don't have to have that high a burden of proof, figuratively speaking.

Mr. DI GREGORY. That is right because as you said yourself earlier, this is not protected speech under the first amendment.

Senator BIDEN. Now, what do you see most as the biggest gap?

Mr. DUPILKA. Well, your analysis is exactly correct. In our investigative work, it is part of our responsibility to satisfy all the elements of the statute and determine if, in fact, we can identify a child as being the victim, whether it is a sexual depiction or just lewd exhibition of the child's genitals. So by not having this statute that you have proposed in place, we have to go through additional steps in an effort to close that loophole or the defense argument that this is not a depiction of a child, but that it is a composite of different elements, so needing this legislation to do that is very important.

The other thing that I would offer is what I tried to mention earlier in my statement that people create this erotica that they use to satiate their desires, and with this type of technology they can take legitimate commercial photographs of children, whether it is for advertising purposes or other photographs, and then start to move heads and bodies around so that those children, in effect, become abused because of the guilt that that puts upon the child seeing themselves in that——

Senator BIDEN. To the extent that you know, do they just randomly pick the face of a child when, for the lack of a better phrase, they morph a child's face on an adult or another child's body, or is there some nexus? I mean, do they just go out and pick a child out of the blue? Does the child not have any notion that their face is being used? How, mechanically, do these people work?

Mr. DUPILKA. If I might, we have all recognized the fact that this type of material is used to seduce children, and you can take the child's head from a local community where you have taken photographs or videotapes and then transfer them into a visual depiction that is created by a pornographer and use that to break down the child's inhibitions or to create that sense of guilt and buildup the fact that that is OK for them to do those types of things; that, in fact, these children are having fun and here you are in the picture and use that.

Senator BIDEN. I see. So it is not merely just to satisfy the perversion of the person to whom it is being sold. It also has a double-edge sword: It is used as a device to take the child who is not engaged in the pornography or been put in that position and put their head on another body; then it is used to seduce them into thinking

it is all right to do whatever they have just seen themselves being depicted as doing even though they did not do it. Is that right?

Mr. DUPILKA. Both of those are possibilities, yes, sir.

Senator BIDEN. My last question——

Mr. DI GREGORY. Senator, I just need to clarify my earlier answer. If there is the head of one child on the body of another child and that body is engaged or is being made to engage in a sexual act——

Senator BIDEN. You need not prove that.

Mr. DI GREGORY [continuing]. We need not prove it if it is simply an exhibition with one child's head——

Senator BIDEN. But as a matter of proof, do you have to identify the body of the child? In other words, do you have to put a name on that body in order to be able to do that? Do you understand what I am saying?

Mr. DI GREGORY. I think we simply have to put the name on the face.

Senator BIDEN. Right. Now, my last question—I realize my time is up. Maybe you could submit this for the record if you don't have the information readily available to you. How pervasive is this problem either in terms of, to put layman's terms on it, the number of customers there are out there, the number of children that are abused, or the dollar amounts that we are talking about being generated? Do we have any notion of how big a deal this is? Obviously, if it affects one child, it is a big deal, but do we have a sense of how pervasive this is, and is it growing, diminishing, or is there a stable number of perverts out there that is the same group to whom this appeals? Do we have any idea?

Mr. DUPILKA. Statistically, we know that child sexual abuse is on the rise, and in this country the child pornography investigations that we have been conducting over the years are now starting to increase again because, as I pointed out, of the computer availability of images. The extent of the problem, we don't know. Generally, it is not a commercial enterprise. Our recent success in California, in conjunction with the Justice Department, shows us that there is opportunity in foreign nations to create this type of material and import it into the United States. That business was grossing a couple hundred thousand dollars a year.

Mr. DI GREGORY. Senator, we simply have to establish that that face that you referred to earlier was a minor. That is all we have to do. We have to identify that as a minor, not as a particular minor.

Senator BIDEN. Thank you.

The CHAIRMAN. Thank you.

Senator Grassley.

Senator GRASSLEY. Mr. Di Gregory, I am not going to ask any oral questions about the subject that Senator Hatch brought up about the situation and the allegations in Phoenix because I don't think this is the place to do it, but I think in your position as Deputy Attorney General in the Criminal Division, you are a very important person to help us find answers about those allegations.

Mr. DI GREGORY. Yes, sir.

Senator GRASSLEY. Thank you.

Mr. DI GREGORY. You referred to me as Deputy Attorney General. I appreciate the promotion, Senator. It is Deputy Assistant, but thanks.

Senator GRASSLEY. Deputy Assistant Attorney General, yes.

To both of you, it is my understanding that pedophiles and child molesters form very tightly knit networks to exchange information about child pornography and sometimes even about specific children. Have either of you encountered discussions of computer-generated child pornography in investigating these networks? I suppose a follow-up would be is there evidence that pedophiles are aware of this new technology and are using it, either one of you?

Mr. DUPILKA. Well, I would say, yes, they are aware of it and, yes, it is most likely being used, but it is so possible to do this and create a professional image that investigators and even physicians have a difficult time deciding whether or not the transformed parts are of the same individual or if the head is of another child. It is almost impossible for the layman, even the people that we have doing this on a full-time basis that have become expert.

Senator GRASSLEY. Now, my question was related to your investigation of networks of pedophiles. Does this come up in your investigation of networks or is it pretty much an ad hoc sort of thing of how it shows up?

Mr. DUPILKA. We haven't documented, to my knowledge, any bulletin board discussions of using these different techniques to create these types of images.

Senator GRASSLEY. Mr. Di Gregory, do you have anything to add to that?

Mr. DI GREGORY. No, sir, I don't.

Senator GRASSLEY. In written testimony, it has been suggested that pedophiles are using computer networks to contact and seduce children. During our discussion of the telecommunications bill, I proposed language that would make it a crime to do that. This language was adopted by the conference committee in section 508 of the telecom bill. I say that to say that I agree with your view that there is evidence that child molesters are using computer networks to try to do this. In your view, is there also evidence that they are using child pornography transmitted by computer to aid in this seduction?

Mr. DUPILKA. We know that pedophiles exchange the images amongst themselves often to reinforce the fact that their behavior is not aberrant, as we all know it is. Whether or not they are being used to seduce children, I couldn't say that, Senator. We investigate the actual—our jurisdiction lies in the fact that it is mailed and we try to get the mailing to an agent in an undercover capacity.

Senator GRASSLEY. Mr. Di Gregory, in the actual prosecution, have you run across any of this?

Mr. DI GREGORY. I am not aware of any of this that we have run across in actual prosecutions, and I don't recall as I sit here whether or not we have come across this in investigations. We may have, Senator, but I will——

Senator GRASSLEY. If you would, then, you could submit that addition to your answer to my question.

Mr. DI GREGORY. Sure.

Senator GRASSLEY. Now, in this bill of Senator Hatch's there are changes to 42 U.S.C. 2000(aa). Could you describe how the Justice Department or the Postal Service tries to comply with the statute? I know that some of the computer organizations are opposed to enforcing the pornography laws in cyberspace. They view this statute as a way to deter investigations and prosecutions.

In my view, the section of the existing statute is poorly worded, and hence needs to be changed as Senator Hatch is doing it. So my second question is what is the view of the Justice Department and the Postal Service on the addition of the good-faith exception in this section?

Mr. DI GREGORY. We are supportive of this amendment, Senator, because as you may be aware, what occurs so very often when investigators try to seize evidence of child pornography that is on computers is that that evidence of child pornography is commingled with what would be classified as constitutionally protected speech, and they currently stand to be held liable in certain instances if they conduct such searches.

So we are supportive of this legislation which will allow the investigators to perhaps avoid such liability if they act in good faith and if the object of the search is indeed the computer child pornography and not the protected material which would be commingled with it.

Mr. DUPILKA. We agree with that also, Senator. The agent has the responsibility to act in good faith. With the language as written, it would allow any plaintiff the opportunity to try to show that there is a bad-faith exception available and this would go a long way to protecting agents and allowing them to do their job.

Senator GRASSLEY. I am done, so basically you are saying the way that Senator Hatch's bill changes the language makes it possible for you to make effective use of this section 2000(aa).

Mr. DI GREGORY. Well, what we would like to do, Senator, because we have got this difficulty in a variety of criminal cases and not just child porn cases—we support it, but we would like to extend it even further to allow that to happen, to allow the investigators to go after these things.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Feinstein, we will turn to you.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Di Gregory, beginning on page 13 in your written remarks, you begin to comment on how the bill could be strengthened. One of my concerns is this. I believe that the American people have no acceptance for child pornography at all and that it really is in the public interest to see to it that the practice is deterred in the strongest possible way. The question becomes, how?

Even despite laws on the books now, child pornography is flourishing, whether it be by actual photograph or facsimile or montages or anything else. How do we end it? How do we create the kind of set of laws that can really be effective in deterring it? Would you please comment on some of the strengthening of penalties that you recommend in this?

Mr. DI GREGORY. Senator, if Senator Hatch and if this committee and if the Congress of the United States would go along with, or

would choose to support one of the additions that we have recommended which would treat the pornography that does not use actual children, the imaging that does not use actual children which would treat that as obscenity rather than as pornography, then we would suggest that in order to emphasize a commitment to stamping out that—if you are going to use the obscenity standard, to stamping out that fantasy pornography, if you will, then increase the penalties for the uses of these kinds of fantasies under the obscenity sentencing guidelines.

Senator FEINSTEIN. To what?

Mr. DI GREGORY. We don't have a specific proposal in terms of the increase, whatever the increase would be in the base offense level, but we would be willing to work with people on the committee to do that should the committee, as I said, and should the Congress choose to take that course rather than choose to treat this as child pornography.

Senator FEINSTEIN. Do you think that would be more effective?

Mr. DI GREGORY. I don't know that it would be more effective. I think that the best I can say to that is that based upon—I would simply say that you would be on the firmest possible constitutional ground if you used the Miller test on obscenity for that kind of fantasy pornography and then applied an increase in the sentencing guidelines for obscenity. Let me state it that way.

Senator FEINSTEIN. Would you be willing to develop that a little bit more in writing, and also why you think it would be sustained constitutionally, as well as suggested sentence-tightening?

Mr. DI GREGORY. I will do that, Senator.

Senator FEINSTEIN. Are there any other specific actions that you think this committee could take with respect to tightening the existing law?

Mr. DI GREGORY. I think that the specific actions that we have recommended include increases in the base offense levels for the possession and production of these kinds of materials.

Senator FEINSTEIN. Would you comment on your comment on page 18 where you urge that the statute prohibit knowing possession of 3 or more visual depictions that are contained in books, magazines, periodicals, films, et cetera? In other words, it is 3 pictures versus 3 disks that have a multitude——

Mr. DI GREGORY. Right, 3 pictures as opposed to 3 disks or 3 books. That is right.

Senator FEINSTEIN. Yes.

Mr. DI GREGORY. This would also be a manner in which we could tighten and more effectively enforce against those who would possess this material because, unfortunately, when any statute or law is passed or any guidelines are referred to which talk about a limit to the number of items that you can possess in order to avoid prosecution by a certain entity, those people who choose to possess these kinds of things and who choose to traffic in these kinds of things will then make sure that they come under the limit, and it is easy for someone who wants to come under the limit when you are talking about magazines to have hundreds, if not thousands, of these visual depictions contained in these magazines, yet still only have 2 magazines or 3 magazines. By focusing on the visual depictions, we are making it tougher, I think.

Senator FEINSTEIN. Thank you. Mr. Chairman, I think your bill is excellent. I would like to be listed as a cosponsor.

The CHAIRMAN. Well, thank you. We will be honored to have you on it.

Senator FEINSTEIN. I would also like to work with these gentlemen to see if we can't toughen it even more.

The CHAIRMAN. We think we can. We are paying very strict attention to what you are saying here and we are going to work with you. We want to make sure that it is the best possible bill, that it is a bipartisan bill that will do the job in this area and give you the tools that you both need, and both your organizations.

Senator FEINSTEIN. Thank you very much.

The CHAIRMAN. Thank you. We are honored to have you on the bill.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. I agree with Senator Feinstein. There is no area where I think there is just a total lack of public tolerance of abuse than this area.

I am technically the least competent person on this panel that is up in front of you. I still write my books on a manual typewriter. How do you go about getting someone who uses that computer to transmit this stuff?

Mr. DUPILKA. Well, in our case, Senator, what often happens is that the people using computers have not completely given up on the mail and they engage in conversation, correspondence, on bulletin boards, but they will often use the mail to transmit the depictions to the undercover agent, so that the computer images actually fall within our jurisdiction.

As Kevin mentioned, the FBI has been working on the cases where the images are transmitted electronically over the networks. As we showed earlier, I have a CD–ROM that would address the multiple-piece question that Senator Feinstein raised. A CD–ROM can hold almost an encyclopedic volume of images. So having two of those, the pornographer could transmit those to hundreds, if not thousands, of people around the country and they could be imported electronically over wire from foreign countries, such as Holland, where the laws aren't very strict into the United States and then distributed within the country.

Senator SIMON. Do you work with the FBI? Is there good coordination on this kind of thing?

Mr. DUPILKA. Well, just as you say, there is no one in the general population that tolerates child pornography, except pedophiles. In the law enforcement community, there is great cooperation because everyone has a very strong interest in making sure that this type of activity is not allowed to continue or flourish.

Senator SIMON. Then just a final question. The people who are engaged in this kind of thing—you have seen enough cases; certainly, Mr. Di Gregory, you have. Are there signals that these people send out long before they get involved in this that, you know, I am sick? Are they sending out signals or is this just an aberration that shows up later in life and there are no early signals of this?

Mr. DI GREGORY. Senator, I am sure there are some people who do show those early signals, but oftentimes nobody detects those early signals and oftentimes these people who have this sexual in-

terest in children are people who are the pillars of the community. Persons who live among them in their neighborhoods or who go to church with them or who go to work with them will tell you, once they realize that this person has been arrested or prosecuted for this kind of offense, that they could not possibly believe it. So I suppose in some cases, that is true. The signs are there, but in many cases nobody knows until the arrest is made or until the search is executed that someone is involved in this.

Senator SIMON. I thank you both. Thank you for your leadership in this. Thank you, Mr. Chairman.

The CHAIRMAN. Well, I want to thank you both for being here. Thank you, Senator Simon. Thank you both for being here. We think you have helped the committee a great deal, and we will work together on this legislation and try and get it so that the Administration is very pleased with it as well as everybody on this committee, and hopefully everybody in the Congress. Let us try and get it through before the end of this year. I think it is about time we put a crimp in these people's plans. Thank you so much. We appreciate both of you coming and spending the time with us.

Mr. DI GREGORY. Thank you, Mr. Chairman and Senators. Thank you very much.

Mr. DUPILKA. Thank you for the opportunity.

The CHAIRMAN. Our second panel consists of the following individuals. We will call first on Dr. Victor Cline, a personal friend of mine who is emeritus professor of psychology at the University of Utah; then Ms. Dee Jepsen, president of Enough Is Enough, a national nonpartisan organization combating child pornography headquartered in Fairfax, VA, one of the leaders in this country; Professor Frederick Schauer, Frank Stanton professor of the first amendment at the Kennedy School of Government at Harvard University; Ms. Judith Krug, director of the Office for Intellectual Freedom of the American Library Association; and, finally, Mr. Bruce Taylor, president and chief counsel of the National Law Center for Children and Families in Fairfax, VA, and a former senior trial attorney with the Justice Department's Child Exploitation and Obscenity Section.

So we will begin with you, Dr. Cline, and then we will go across the table.

Senator GRASSLEY. You mentioned that he was a famous Utahn. Dee Jepsen is a famous Iowan.

The CHAIRMAN. Well, we think they are both famous and they are both very good friends, so we are happy to have both of you here and we look forward to your expertise in this area.

PANEL CONSISTING OF VICTOR CLINE, EMERITUS PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF UTAH, SALT LAKE CITY, UT; DEE JEPSEN, PRESIDENT, ENOUGH IS ENOUGH, FAIRFAX, VA; FREDERICK SCHAUER, FRANK STANTON PROFESSOR OF THE FIRST AMENDMENT, KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, CAMBRIDGE, MA; JUDITH F. KRUG, DIRECTOR, OFFICE FOR INTELLECTUAL FREEDOM, AMERICAN LIBRARY ASSOCIATION; AND BRUCE A. TAYLOR, PRESIDENT AND CHIEF COUNSEL, NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, FAIRFAX, VA

STATEMENT OF VICTOR CLINE

Mr. CLINE. Thank you, Mr. Chairman and members of the committee. My remarks are an abbreviation of extended remarks. Copies have been made available to the committee.

My name is Victor Cline. I am a clinical psychologist and psychotherapist specializing in marital and family counseling and the treatment of sexual compulsions and addictions. I also work with the victims of sexual abuse and assault. Additionally, I am a behavioral scientist with approximately 85 publications, some of which are in the area of media and pornography effects. In the last 26 years, I have treated approximately 350 male sexual addicts or compulsives, including many pedophiles and their victims. I also treat rapists, voyeurs, fetishists, those making obscene phone calls, and those compulsively promiscuous and many other types of paraphilias.

These sexual issues or problems all have a common core and dynamic base. They are sexual in nature, highly addictive, compulsive repetitive, very difficult to treat, and self-control and self-discipline don't stop their occurrence. In the case of pedophiles, the overwhelming majority, in my clinical experience, use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to, then later use as a model for their own sexual acting-out with children.

I find that the use of child pornography, in time, desensitizes the viewer to the pathology. No matter how aberrant or disturbing, it becomes acceptable and preferred. The man always escalates to more deviant material and the acting-out continues and escalates, despite very painful consequences, such as the destruction of his family, the loss of spouse, children, job, health, or incarceration after committing criminal acts.

Some also use it to seduce children into engaging in sexual acts with themselves. When they introduce it to children, the suggestion is that this is normal behavior and many other young children like themselves also use it and do these things. Pedophiles often trade, lend, or sell the pictures they make of young people nude, having sex, through an informal network.

Some of the pornography they accumulate is of females fully developed anatomically but made to look young and immature by dressing them in children's clothes and arranging their hair, such as with a pony tail, to suggest to the viewer that they are under-age minors when, in fact, they may not be. While the producers of this material may claim that no under-age children were used in

producing this pornographic material, to the viewer this is irrelevant because they are perceived as minors to the psyche.

Many of my patient perpetrators and sexual predators are teenage males who sexually abuse younger sisters or other younger, more vulnerable children in the neighborhood. With most of them, I find any kind of pornography, child, adolescent, or even adult, can act as an incitement to imitate it in real life with someone they have access to and can intimidate not to tell. Many of my predators are also themselves victims with a history of being sexually abused by older pedophiles at a previous time in their life.

With a large majority of them, an underlying threat is the use of child, adolescent, or adult pornography to stimulate appetite and provide models of sexual abuse, as well as to be used as tools to seduce new victims. In my experience, it is the child pornography that is the most malignant. Child pornography is particular pernicious because the child victims, whether sexually abused while being photographed or exposed to it as part of their seduction, are relatively powerless due to their young age and immaturity, as well as not fully understanding the harm potential. Their frequent willingness to trust an older person who appears to be kind and accepting of them makes them more easy prey.

The best evidence to date suggests that most or all sexual deviations are learned behaviors, usually through inadvertent or accidental conditioning. There is no convincing evidence to date suggesting the hereditary transmission of any pathological sexual behavior pattern, such as pedophilia, rape, incest, exhibitionism, et cetera. In fact, one British psychologist, Dr. Stanley Rachman, demonstrated in the laboratory using live subjects how easy it is to repeatedly condition normal males into sexual illness or addiction.

In conclusion, the presence of child pornography creates the potential of many types of harms in the community, including helping to create sexual predators or pedophiles, and later their victims.

Thank you.

The CHAIRMAN. Thank you, Dr. Cline.

Ms. Jepsen, we will take care of you.

STATEMENT OF DEE JEPSEN

Ms. JEPSEN. Thank you, Mr. Chairman. I, too, would like to ask that the full text of my remarks be entered into the record.

The CHAIRMAN. Without objection.

Ms. JEPSEN. Mr. Chairman and members of the committee, I would like to speak here today in support of S. 1237 not only on behalf of the work of Enough Is Enough, but as a grandmother of nine and on behalf of the concerned mothers of this country. I would urge you to consider this not only as a legislative issue, but also as a heart issue. This is a matter of protecting America's children in our modern technological age.

The Congress, in its wisdom, has outlawed child pornography, and that legislation has been upheld by the courts. I was very pleased to hear Senator Biden reaffirm that to us today. This is not protected speech, and that matter has been settled.

S. 1237 addresses child pornography from the perspective of the 1990's. It updates the pornography laws, making them current and

relevant, and it would require that any pornography containing depictions, or what appear to be depictions of children be treated under law as child pornography, including computer-generated child pornography. Current computerized electronics make it possible to create images that are substantially indistinguishable from actual photographs of human beings. It also should be noted that this computer software is available very readily today.

Child pornography is a pornography specialty item of great interest to those whose sexual pathology defines them as pedophilic, or as we call them, pedophiles. These individuals have a strong interest sexually in children. Therapists who treat sexually addicted persons declare, and studies confirm, that pornography, often child pornography, does play a major role in the molestation process with children.

A work that carries the endorsement of the American Academy of Pediatrics, "Child Lures Family Guide for Prevention of Assault and Abduction," written by Ken Wooden, addresses pornography by saying, "Molesters often expose children to pornography, thus 'normalizing' sexual activity and setting the stage for seduction." It goes on to warn parents that they should keep their home pornography-free.

Experts attest that pornography is very addictive, as we have heard, and it is an addiction that escalates and often leads to the crime of sexual exploitation and sexual and domestic violence. Studies show that over 80 percent of convicted child molesters admit to the use of pornography often in the commission of their crimes. An average child molester has between 360 and 380 victims in their lifetime. This figure blew my mind when I heard it. The National Victims Center in 1992 estimated that 29 percent of all forcible rapes in America are against children under the age of 11. That is heart-breaking to me.

It is difficult to quantify cause and effect, however. There is some new research that should shed some additional light on this matter from a scientific research perspective. In 1992, the Canadian Supreme Court ruled that all pornography should be banned as harmful to women, and the Ontario Human Rights Commission then requested Dr. Judith Reisman, an American pornography researcher, to perform a study to review pertinent literature on the psychology of the human mind to understand the effect of what is called SEMI, the sexually explicit media/images, and what effect it has on the brain, the mind, and the memory.

I quote from the executive summary of Dr. Reisman's work:

> Recent brain research reveals that memory and emotion, what we think is funny, sad, serious or cruel, is controlled by a complex labyrinth of neurons in each brain. Moreover, neurologists report that one stores images, that is pictures, faster and with more permanence than a group of words in a text. Since viewing images chemically and structurally alters the human brain * * * the brain is 'hard-wired' to believe what the eyes see in three-tenths of a second.

Sexual displays and pornography trigger excitatory transmitters and a rush of hormones which short-circuit rational left-brain thinking, permanently changing neural pathways. Just SEMI is fully documented as neurochemically triggering sexually inhibited viewers to engage in sexual behavior, SEMI is also on record as neurochemically triggering some vulnerable viewers to engage in

criminal and violent sexual conduct. SEMI pictorial fantasy is coded as real within the human brain. All SEMI inevitably affects the emotional and physical health and safety of the user and those around him or her.

Dr. Reisman's work scientifically confirms that child pornography is actually "hard copy," if you will, visualizations of the pedophile's dangerous mental fantasies of having sex with children. These images will play in the theater of their minds for life.

I close by quoting from the words of a mother of one of the young boys who was sexually molested by a man arrested in the recent U.S. Postal Inspectors' child pornography bust, Project Special Delivery. The grieving mother wrote that the molester had started the seduction process with her young son by showing him pornography.

She says, I quote:

* * * what he did to my son * * * is something my family will have to live with for the rest of our life. My son used to do good in school. His teachers told me he was a quiet and well-mannered young man. When he entered seventh grade, which is when he started working for our neighbor, his attitude changed. He refused to suit up for P.E., did not do well in school. His grade point average was 1.17. He did not do his homework. He was kicked out of two schools. He was not the same child. What happened to my son will take a long time to heal and a long time to forget * * * if he is able to forget.

She goes on to say,

The children that are victims of child pornography and child molestation suffer a great deal mentally and it takes a lot for these children to be able to put their life together and hopefully not repeat the pattern of what happened to them.

She closes by saying,

All our representatives have a duty to make this world safe for our children and they should start by listening to the cries of the families out there that are the victims.

The misuse of the advancing computer technology is a worldwide problem. England and Canada are two countries that have addressed the issue at this time, and I would respectfully urge that the U.S. Congress do the same and that S. 1237 will be passed into law for the sake of the children. I might humbly suggest that it certainly would send a loud and clear statement if all the members of the Judiciary Committee were to, of course, cosponsor this legislation that Senator Hatch has put forth in such a fine fashion here.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Jepsen follows:]

PREPARED STATEMENT OF DEE JEPSEN

Mr. Chairman, in my capacity as President of "Enough is Enough!"—a non-profit, nonpartisan women's organization opposing child pornography and illegal obscenity, I speak in support of S. 1237, The Child Pornography Prevention Act of 1996. I speak today not only on behalf of the work of "Enough is Enough!", but as a woman, a mother, a grandmother of nine, and on behalf of the mothers of this country; I urge you to consider this not just as a legislative issue, but as a heart issue. This is a matter of protecting America's children in our modern technological age.

The Congress in its wisdom has outlawed child pornography, and that legislation has been upheld by the courts. Child pornography is illegal; it is not protected speech. That matter has been settled. All S.1237 does is address child pornography from the perspective of the 1990's; it updates the child pornography laws, making them current and relevant to contemporary technological advances. S.1237 would require that any pornography containing the depictions, or what appear to be depictions, of children be treated under the law as child pornography—that would include

computer-created child pornography. Current computerized electronics make it possible to create images that are substantially indistinguishable from actual photographs of human beings. All one has to do to confirm the ability of this new technology is review some of the film industry's electronically-created action scenes. It should also be noted that computer software is easily available that can be used to "scan" two images to produce compose images, and "paint" packages can be used to create the user's own desired images.

Pornography is a big money business, primarily controlled by organized crime. It has been estimated to be an eight to ten billion dollar a year business and is said to be its third biggest money maker, after drugs and gambling. Child pornography is a pornography specialty item, of great interest to those whose sexual pathology defines them as a pedophiliac; they are commonly called pedophiles. These individuals have a strong sexual interest in children.

Author Dr. Shirley O'Brien in her book entitled *Child Pornography*[1] states, " A direct relationship exists between pornographic literature and the sexual molestation of young children. Law-enforcement officers say they routinely find pornographic material when they investigate sex crimes against children. Supporting this evidence, victims say they were shown pornographic literature, films or photos during various stages of their exploitation."

Counseling therapists who treat sexually addicted persons declare, and studies have confirmed, that pornography does play a role in the child sexual molestation process, often child pornography. It is used to stimulate the perpetrator, shown to the child to break down their inhibitions and as an instruction manual for their exploitation. If the molestation is filmed or photographed by the molester, that material is often used to blackmail the child into silence.

A work that carries the endorsement of the American Academy of Pediatrics, *Child Lures Family Guide, For Prevention of Assault & Abduction,* was written by Ken Wooden. Mr. Wooden, an expert in this field, is a former investigative reporter for numerous television network programs. In reviewing the various lures that child molesters use to lure children, the following quote on pornography is noted.

PORNOGRAPHY

> Molesters often expose children to pornography, thus "normalizing" sexual activity and setting the stage for seduction. Children as young as three or four may imitate sex acts they have viewed in pornographic videos or magazines. Finally, exposure to pornography may jeopardize a child's credibility if criminal charges are filed against the perpetrator.

PREVENTION

> Again, tell children that it is against the law for adults to touch the private parts of their body. If children are acting out sexually, find out how and where they learned this behavior. Parents, pledge to keep your home free of pornographic material. All children are especially curious when it comes to sex.[2]

Knowing that pedophiles have a perverse interest in child pornography is troubling, but even more disturbing is that experts attest to the fact that pornography is very addictive to many. It is an addiction that escalates, requiring more graphic or violent material for arousal, then leads to the persons in the material being seen as objects, without personality, rights, dignity or feelings. The final stage is "acting out," doing what has been viewed in the pornography. This leads to crimes of sexual exploitation and violence.

The following statistics add to the concern all responsible, caring Americans should have about the sexual exploitation of children, and the major role pornography plays in these crimes.

- *87% of convicted molesters of girls and 77% of molesters of boys admit to use of pornography, most often in the commission of their crimes.* 1983 "A Report of the Use of Pornography by Sexual Offenders" by Dr. William Marshall, Ottawa, Canada.
- *An average child molester has between 360–380 victims in his lifetime* (G. Abel, J. Becker, M. Mittleman, J. Cunningham-Ratner, J. Rouleau & W. Murphy [1987]. Self reported sex crimes of non-incarcerated paraphiliacs. "Journal of Interpersonal Violence", 2 (1), 3–25.
- *29% of all forcible rapes are against children under the age of 11.* National Victims Center 1992.

It is difficult to quantify "cause and effect" as it relates to what actions mentally-recorded stimuli initiate or encourage. We must rely often upon "antidotal" evidence. It is antidotal evidence that motivates the producers of products to spend multi-millions of dollars advertising on television and in publications each year. Those ads

motivate consumers to buy their products. They know it works. Their sales records show it does, yet the connection of viewing the ads and purchasing the products is antidotal.

There is some new research that has been conducted, however, that should shed some additional light on this matter from a scientific research perspective. In 1992, the Canadian Supreme Court ruled unanimously that all pornography should be banned as harmful to women. The Ontario Human Rights Commission then requested Dr. Judith Reisman, veteran pornography researcher and communication specialist, to perform a study to review pertinent literature on the physiology of the human mind to understand the effect Sexually Explicit Media/Images (SEMI) has on the brain, mind and memory.

The following quotes are taken from the Executive Summary of Dr. Reisman's new book *Sexually Explicit Media/Images (SEMI) And The Human Brain.*[3]

> Recent brain research reveals that memory and emotion, what we think is funny, sad serious or cruel, is controlled by a complex labyrinth of neurons in each brain. Moreover, neurologists report that one stores images, that is pictures, faster and with more permanence than a group of words in a text. Since viewing images chemically and structurally alters the human brain, the public's concern about sexually explicit media/images might focus not on "morality" or "taste" but on how images effect the brain, mind and memory. People often believe that when they view a sexually explicit media/image (SEMI) the image is temporary and transitory. Moreover, sexually explicit images are "read" by literate and illiterate, young and old alike. The new physiological data on the brain indicate that many men, women and children carry pornographic memories and emotions with them in their daily lives. Perceived as arousal, sexually explicit memories are often emotionally charged with feelings of shame, fear and even violence.
>
> * * * the vast majority of Americans have been imprinted, to a greater or lesser degree, by SEMI and by the impulses which those images engender. The brain is "hard-wired" to believe what the eyes see in 3/10ths of a second. This author's formal and empirical study finds that "copycat sexual crimes" against women and children mirror the changing brutality of SEMI content.
>
> Defining our Terms: All SEMI are intimate, private space behavior in public space forums. As such, these at-risk female displays trigger excitatory transmitters and a rush of hormones which short circuit rational left hemisphere thinking. Permanently changing the viewer's neural pathways * * * Just as SEMI is fully documented as neurochemically triggering sexually inhibited viewers to engage in sexual behavior, SEMI is also on record as neurochemically triggering some vulnerable viewers to engage in criminal and violent sexual conduct * * *
>
> SEMI pictorial "fantasy" is coded as real within each brain * * *
>
> * * * all SEMI inevitably affects the emotional and physical health and safety of the SEMI user and those around him or her.

In the case of pedophiles, Dr. Reisman's work scientifically confirms the fact that child pornography is actually "hard copy" visualizations of their dangerous mental fantasies of having sex with children. And those images will play in the theater of their minds for life. Experience tells us that people read material that they enjoy and in which they are interested. Fishermen read fishing magazines * * * and generally go fishing. It is only logical that those who view child pornography wished to act out that which they have viewed.

In urging the adoption of S.1237, I would like to close by quoting the words of the mother of one of the young boys who was sexually molested by a man arrested in the recent U.S. Postal Inspector's child pornography bust, Project Special Delivery. The grieving mother wrote the "Enough is Enough!" office to tell us that the molester had been a neighbor who they thought was a friend. He had started the seduction process with her son, who was in seventh grade, by showing him pornography. These are her hurting words.

> * * * what he did to my son * * * is something my family will have to live with for the rest of our life. * * * My son used to do good in school. His teachers told me he was a quiet and well mannered young man. When he entered seventh grade which is when he started working for our neighbor, his attitude changed. He refused to suit up for P.E., did not do well in school, his GPA was a 1.17, he did not do his homework, was kicked out of two schools, he was not the same child. What happened to my son will

take a long time to heal and a long time to forget * * * if he is able to forget.

The children that are victims of child pornography and child molestation suffer a great deal mentally and it takes a lot for these children to be able to put their life together and hopefully not repeat the pattern of what happened to them.

All our representatives have a duty to make this world safe for our children and they should start by listening to the cries of the families out there that are the victims * * *

The misuse of the advancing computer technology is a world wide problem. England and Canada are two countries which have already addressed the issue of computer-generated child pornography. I respectfully urge the United States to do the same, and pass into law S. 1237 * * * for the sake of the children.

REFERENCES

[1] *Child Pornography*—Shirley O'Brien, Ph. D. (page 5) Kendal/Hunt Publishing Company.
[2] *Child Lures Family Guide, For Prevention of Assault & Abduction*—Ken Wooden (page 10) The Wooden Publishing House, Shelburne, Vermont.
[3] *Sexually Explicit Media/Images (SEMI) And The Human Brain*—Judith Reisman, Ph. D., The Institute for Media Education, Published in R.S.V.P. America, Crestwood, KY, March 1996.

The CHAIRMAN. Mr. Schauer, we will turn to you.

STATEMENT OF FREDERICK SCHAUER

Mr. SCHAUER. Thank you, Mr. Chairman. As with the other witnesses, I have submitted a written statement that I assume will be part of the record.

As you know, Mr. Chairman, I was a commissioner of the Attorney General's Commission on Pornography in 1985 and 1986. I was the author of the commission's analysis and conclusions. Ten years later, I subscribe to virtually all of what I wrote 10 years ago in that context.

I am here today to provide a somewhat technical analysis of the particular provisions that I have been sent that are part of S. 1237 and various other proposals or modifications or amendments that might be made to S. 1237. This technical analysis is, for me, based on the desire that I share with everyone that I have heard this morning to maximize the legal efforts against child pornography, but also to recognize the fact that a lawyer who is writing an appellate brief is not a lawyer who is then prosecuting a child pornographer, and a law that spends 3 or more years in legal limbo is not a law that the FBI and other law enforcement authorities then have the ability to use to the maximum efficiency.

In analyzing somewhat more technically the various provisions of the bill, therefore, I want to focus on the constitutional question in light of *Ferber,* for the strategic reasons that I have just mentioned. In looking at the various proposals, there are three dimensions that deserve constitutional attention. One of these dimensions is the extension of the existing child pornography laws to cover recognizable minors, but in a way—or it is an extension insofar as the images are either drawings or computer-generated images or the kinds of collages that we heard about just a few minutes ago that might not be reached under current law, but which are nevertheless images of recognizable minors.

This is indeed a loophole in the existing law. It is somewhat of an extension upon the existing constitutional framework insofar as the *Ferber* case refers to two different justifications for making what would otherwise be an exception to obscenity law. The first

of those justifications is the justification based on the actual use of a minor in the production of the materials. Insofar as it is possible to produce an image of a recognizable minor without actually using a minor, exploiting a minor, molesting a minor in the process of production, it might be argued that this goes beyond *Ferber*.

Nevertheless, *Ferber* talks, as well, about the permanent record that stays with the child for the rest of her or his life. *Ferber* talks also about the invasion of privacy of the minor. Given that those justifications are talked about in *Ferber*, it is my belief that on the existing state of the law the extension to computer-generated images of recognizable minors is highly likely constitutional.

Second, there is the extension of the existing definition of sexually explicit conduct to include lewd and lascivious depictions of the buttocks of a minor or the breasts of a female minor. Given that *Massachusetts* v. *Oakes*, decided by the Supreme Court just a few years ago, said that simply nudity remains constitutionally protected even in the context of minors, this provision is, I would say, constitutionally problematic. But insofar as the courts, and in particular the Supreme Court, were to define these terms in light of the modifier "lascivious," it is highly likely, although not certain, that this constitutional problem would not be fatal.

Third, S. 1237 in its current form does contain one provision that I believe is substantially more constitutionally problematic on existing law. This is the extension to drawings or computer-generated images of non-recognizable minors. Insofar as *Ferber* is concerned about the exploitation of actual children and concerned exclusively about the exploitation of actual children, the extension to computer-generated images of non-recognizable minors includes a justification that one does not find in the existing state of the law.

Indeed, Justice White in *Ferber* said, "We note that the distribution of descriptions or other depictions of sexual conduct not otherwise obscene which do not involve live performances or performances or other visual depictions of live performances retains first amendment protection." In terms of the current state of the law, it appears that on the basis of *Ferber*, on the basis of all the other cases that we have, this extension to non-recognizable minors is highly likely unconstitutional.

The issue is not whether we are for or against child pornography. Almost all that I have read in S. 1237 and the various competing versions are constitutional and highly desirable extensions of the existing state of the law entirely consistent with *Ferber*. Indeed, insofar as material is used for the actual seduction of minors, I do not quarrel in the least with the empirical basis of the fact that this happens. Indeed, it happens not only with child pornography; it happens with adult pornography and a wide range of other materials used for similar purposes.

In pointing out that as to one of the three subjects that I have addressed there is a serious constitutional problem, my goal is not to take weapons away from those who would prosecute child pornography, but only to ensure that those weapons are marshaled in the prosecution of child pornographers rather than costly and timely appellate litigation that on the current state of the law is almost certain to result in a judgment of unconstitutionality.

Thank you.

The CHAIRMAN. Thank you, Mr. Schauer. We will look forward to your helping us to make sure that we get the language correctly.

Mr. SCHAUER. I am happy to do so, sir.

[The prepared statement of Mr. Schauer follows:]

PREPARED STATEMENT OF FREDERICK SCHAUER

My name is Frederick Schauer, and I am the Frank Stanton Professor of the First Amendment at the Kennedy School of Government, Harvard University, and Visiting Professor of Law, Harvard Law School. In 1985–86 I served as a Commissioner of the Attorney General's Commission on Pornography, and was the primary author of the Commission's findings, analysis, and conclusions. I have served as chair of the Section on Constitutional Law of the Association of American Law Schools, and am the author of *The Law of Obscenity* (BNA, 1976), *Free Speech: A Philosophical Enquiry* (Cambridge, 1982), *The First Amendment: A Reader* (West, 1992, 1996), and numerous articles on constitutional law, freedom of speech and press, and the law obscenity and pornography, among which are articles published in *The Supreme Court Review* in 1982 analyzing the child pornography case of *New York* v. *Ferber*, 458 U.S. 747 (1982), and in *The Supreme Court Review* in 1995 analyzing the child pornography case of *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

Out of an abundance of caution, I note at the outset that I speak only for myself, and not for the Kennedy School of Government, the Harvard Law School, or Harvard University. I should note as well that my political affiliation is independent, and I have not registered as a member of a political party in over twenty years. Moreover, I have no political, financial, or fiduciary connections with anyone interested in one way or another in the proposed legislation. Indeed, consistent with my longstanding practice, and consistent with my views about academic independence, I do not represent clients, directly or indirectly, and I do not enter into consulting relationships. I appear at the unsolicited request of the Committee on the Judiciary.

The Supreme Court of the United States has consistently held that imposing criminal penalties for the sale, distribution, and exhibition of obscene materials does not violate the First Amendment. *Roth* v. *United States*, 354 U.S. 476 (1957); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); and, most recently, *Alexander* v. *United States*, 509 U.S. 544 (1993). Although there are some circumstances in which non-criminal regulation of sexually oriented but non-obscene speech is permitted (*Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning of adult theaters); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (FCC regulation of broadcasting)), the general rule is that criminal regulation of sexually oriented materials is permitted only when those materials are obscene according to the test for obscenity set forth in *Miller* v. *California*, 413 U.S. 15 (1973). This general rule was exemplified in *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), in which a unanimous Supreme Court, with Justice White writing the opinion for the Court, overturned an Act of Congress which would have prohibited indecent, but not necessarily legally obscene, so-called "dial-a-porn" communications. *Sable Communications* reflects the longstanding view of the Supreme Court that non-obscene sexually-oriented publications may not be prohibited on the grounds of their indecency, offensiveness, or harmfulness.

The one significant exception to this rule is child pornography. In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Supreme Court, with Justice White writing the majority opinion, held that the states and the federal government have "somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children" than they do in regulating obscenity. The existing state and federal child pornography laws are an outgrowth of the *Ferber* decision, and there has been no indication by the Supreme Court that the constitutionality of laws regulating child pornography are to be evaluated in any way other than according to the *Ferber* framework.

According to that framework, the "greater leeway" that is permitted in the regulation of child pornography is justified by and limited to those cases in which there is "the use of children as subjects of pornographic materials." This is because, "First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." It is thus clear that the exclusive focus of *Ferber* and the constitutional permissibility of regulating the category of child pornography as a separate class is not on the effects of the images on others, even though those effects plainly exist, but instead on the harm to the children actually used in the production of the materials. Nothing in

Ferber suggests that a justification other than the protection of the actual children used in the actual production of child pornography will be constitutionally permissible to warrant the criminalization of non-obscene material.

Ferber addressed child pornography that was created by photographic means, but modern techniques of computer imaging, as well as non-modern techniques of highly realistic drawing and painting, make it possible to produce highly realistic images of children without necessarily using an actual child as a model. To the extent that this is possible, *Ferber*'s concern to eliminate the market for material that requires the sexual exploitation of children for its production is not present, and it might appear that such material is outside of the *Ferber* exception, and can thus be prohibited only if legally obscene. *Ferber*'s other justification, however, the concern for the effect on a child of the "permanent record," might still be applicable insofar as the images are recognizable images of actual children. To the extent that one of the current proposals, the one extending the federal child pornography laws to "pornography depicting recognizable minors," relies on this justification, it is likely constitutional under *Ferber*. Even this is not certain, since *Ferber* talks of the "permanent record of the children's participation," and it might be argued that even this justification is inapplicable without any actual participation. This argument, however, seems weak. The harm of the permanent record exists just because people would perceive it as a permanent record of actual participation of the actual child harmed, and even if there was no actual participation the perception of such based on the permanent record would produce essentially the same harm. Moreover, the Court also talks of the "child's privacy interests," 458 U.S. at 758, interests that are presumably affected by distribution of a recognizable representation even if the child had not in fact engaged in the depicted sexual activity. Consequently, the extension of 18 U.S. C. sections 2251 *et seq.* to include depictions of recognizable minors, even if the recognizable minor did not actually participate in the production of the material, is within one of *Ferber*'s stated justifications and is likely constitutional.

The proposed Child Pornography Prevention Act of 1996, S. 1237, however, goes further and makes reference in its findings (sec. 2(3)) to the way in which "child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity."

The factual premise of this justification is entirely consistent with the evidence produced during the hearings conducted by the Attorney General's Commission on Pornography in 1985 and 1986. Moreover, there is no reason to believe that the practice has decreased in the intervening decade. Almost certainly it has increased. Nevertheless, this is a justification that is entirely absent from the *Ferber* rationale. *Ferber* is exclusively concerned with children used in the actual production of the materials, and not with how materials might thereafter be used to exploit children not involved in the production of those materials. The justification in section 2(3) is not one recognized in existing law, and thus the proposed sections 3(8)(B) and 3(8)(C), extending 18 U.S.C. section 2256 to drawings or computer-generated images and to material represented as portraying a minor engaged in sexually explicit conduct even if that is not in fact the case, are without support in existing constitutional law except insofar as prosecutions would be limited to drawings or computer-generated images of recognizable children. And since *Ferber* itself was decided by the Supreme Court as a narrow exception to the existing rule regarding the necessity of proving obscenity in order to justify criminal prosecution against sexually oriented material,[1] the necessary conclusion is that the proposed sections 3(8)(B) and 3(B)(C) are unconstitutional under existing law. This is made clear in light of the fact that the Court in *Ferber* explicitly allowed the use of simulations of varying kinds, saying that "[a] person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." 458 U.S. at 763. Justice White then went on to state that "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographs or other visual depictions of live performances, retains First Amendment protection." 458 U.S. at 764–75. Thus it is not that *Ferber* did not address the possibility of simulations of non-recognizable minors. It is that *Ferber* did address this possibility, and explicitly held such simulations to be constitutionally protected.

[1] That this is so is underscored by the statement at the beginning of *Ferber* that the assumption by the New York Court of Appeals that obscenity law was exclusive or the constitutionally permissable approach to sexually oriented materials "was not unreasonable in light of our decisions." 458 U.S. at 753.

Although the Supreme Court of course has the power to modify its decision in *Ferber*, or to add additional exceptions to the prevailing rule, there is no current indication of the Court's willingness to do so, even when the issue is child pornography. Although the Court did, in *Osborne* v. *Ohio,* 495 U.S. 103 (1990), distinguish obscenity from child pornography in allowing the criminalization of mere possession of child pornography, this flows naturally from the justification in *Ferber* of eliminating the market for child pornography in order to reduce the incentive for the production of material employing actual children in the production. More recently, however, the Court has been unwilling to expand the scope of the *Ferber* exception. In *Jacobson* v. *United States,* 503 U.S. 540 (1992), the Court invalidated a federal child pornography conviction on entrapment grounds, making clear that even the undeniably compelling interest in protecting children from the exploitation of child pornography would not justify a modification in otherwise applicable principles of constitutional criminal procedure. And in *United States* v. *X-Citement Video, Inc.,* 115 S. Ct. 464 (1994), a 7–2 majority of the Supreme Court, with Chief Justice Rehnquist writing the majority opinion over the dissents of Justices Scalia and Thomas, interpreted the amended version of the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. section 2252, to require that it be proved by the prosecution that the defendant in a child pornography case knew that the material was produced with the use of minors. *X-Citement Video* thus not only indicates that the Court believes that the existence of an actual minor is an essential element of a child pornography case, but also that the Court is unwilling to increase the size of the existing space between child pornography law and the settled principles of obscenity law.[2]

Less technically, there are strong reasons to suppose that the Supreme Court would not accept the proposed expansion of *Ferber.* Although it is true that child pornography is often used as a part of a method of seducing other children, and although it is true that this use would not require the use of an actual child in the production, it is also true that adult sexually oriented materials, mostly materials not even close to being legally obscene, are even more often used for the same purpose. Much of the evidence obtained by the Attorney General's Commission on Pornography was to the effect that children who are shown materials depicting adults engaged in sexual activities are also frequently open to being persuaded that because adults are engaged in these activities, it is appropriate for children to do so as well. Indeed, there is evidence that materials involving simply adult nudity are often used for these purposes by those who seek to seduce children into sexual activity, and at times even material as seemingly innocuous as the underwear pages of mail order catalogues is used to induce impressionable young children into removing all or some of their clothing. Given that material depicting children is only a subset of the much larger set of material used by child molesters to persuade children to cooperate, and given that material depicting non-real and non-recognizable children is only a small subset of that subset, it is extremely unlikely that a majority of the Supreme Court could be persuaded that the proposed extension is necessary. given the tragically widespread use of undeniably constitutionally protected materials in the effort to exploit children, it would be almost certainly impossible to persuade the Supreme Court that this extension of *Ferber* was necessary to serve a compelling interest.[3] And given that the proposed extension, insofar as it went beyond recognizable children, would not serve any of the interests that *Ferber* thought important, the Court is unlikely to take a step that might involve risks to material such as a computer-generated sexually explicit version of *Romeo and Juliet,* or a series

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[2] *X-Citement Video* was technically a statutory interpretation case, but the interpretation was driven by the Court's expressed view that an alternative interpretation would be constitutionally problematic. In reality, therefore, this is one of those statutory interpretation cases that is functionally equivalent to a constitutional ruling. I expand in this, in the context of *X-Citement Video,* in Frederick Schauer, *Ashwander Revisited,* 1995 Supreme Court Review 71.

[3] The Court in *Ferber* talks about child pornography prosecutions being justifiable because distribution is an "integral part of the production of such materials," the production itself being "illegal throughout the nation." Noting that if the primary prohibition (on the use of children) were fully effective, the material would not exist, the *Ferber* Court stresses the "economic motive" in its "integral part" analysis. This is inapplicable here, in part because a totally effective prohibition on the seduction of children would not necessarily guarantee the non-existence of the simulations, and in part because there is little evidence that the production of the simulated materials is driven by the economic motive of providing aids to seduction. That simulated materials are used for seduction is thus not even close to what the Court was imagining when it talked about materials being an "integral part" of the illegal activity. If that were the case, then the full range of protected adult materials would also become unprotected because they could be used as aids in the molestation of minors. The likelihood of the Supreme Court accepting this argument is negligible.

of drawings or paintings or non-existent and non-recognizable teenagers displaying their public areas.

The foregoing suggests a potential problem with section 3(1) of the proposed S. 1237 as well. The proposal would amend the definition of "sexually explicit conduct" in 18 U.S.C. section 2256(2)(E), which now includes "lascivious exhibition of the genitals or public area of any person," to include as well the phrase, "or the buttocks of any minor, or the breast of any female minor." It is possible that the Supreme Court would take the modifier lascivious as being sufficient to distinguish the expanded category from non-regulable nudity (see *Massachusetts* v. *Oakes*, 491 U.S. 576 (1989)), even nudity involving children, *id.*, but it is also possible that this modification would be seen as sufficiently close to a prohibition on simply nudity that it would create constitutional problems independent of the constitutional problems created by the inclusion of images of non-existent or non-recognizable children.

What emerges from the foregoing is that on the existing state of the law, the proposed expanded definition of the term "sexually explicit conduct" is constitutionally problematic, and the proposed expansion of the category of child pornography to include recognizable images of actual children, even if the children were neither photographed nor used in the production, is probably constitutional, even though not certainly so, because it relates directly to one of the justifications recognized in *Ferber*. But the proposed expansion to include drawings or computer-generated images of non-recognizable children, which is keyed to no justification that is recognized in existing law, is unconstitutional on the existing state of the law.

I have been asked to testify here not as to what I think the law ought to be, assuming that my view on that question made any difference to the Supreme Court, but as to what the constitutional law as set forth by the Supreme Court of the United States actually is. And on the existing state of the law, only the extension to depictions of recognizable minors has any basis in existing constitutional law. The other proposals fall within the general rule that non-obscene sexually oriented materials may not be prohibited by the criminal law, and thus the other proposals are unconstitutional on the existing state of the law, an existing state of the law that the Supreme Court has shown absolutely no inclination to change. Although *Jacobson* and *X-Citement Video* make it highly unlikely that the Supreme Court will accept the drastic modification in child pornography law that is the centerpiece of the Child Pornography Act of 1996, such an outcome is of course not impossible, and no one could plausibly say that it is totally impossible. Still, enacting laws that are unconstitutional on the existing state of the law, and which are extremely unlikely to produce a change in existing constitutional law, is hardly cost-free. Time is expended during which court challenges may put more of existing child pornography law than is intended into constitutional limbo, and resources are expended in litigating constitutional challenges that might better be spent in prosecuting child pornographers. Accordingly, it is highly probably that embarking on a course so likely to be unsuccessful as a matter of constitutional law will wind up hurting rather than helping the cause of prosecuting the increasing number of individuals who exploit children through child pornography, and hurting rather than helping the cause of adapting child pornography law to modern technological developments in the way most likely to facilitate increased prosecution and least likely to detract resources away from actual prosecution of child molesters and those who cater to them.

The CHAIRMAN. Ms. Krug, we will turn to you.

STATEMENT OF JUDITH F. KRUG

Ms. KRUG. Thank you. I, too, have submitted a statement with supplementary information and I ask that it be included in the record.

The CHAIRMAN. Without objection.

Ms. KRUG. I am the director of the Office for Intellectual Freedom of the American Library Association. I am also the executive director of the Freedom to Read Foundation, and today I also represent Media Coalition, of which I am the current chair. Media Coalition represents most of the book and magazine publishers, booksellers, librarians, periodical wholesalers and distributors, recording and video game manufacturers, and recording and video retailers in the United States.

All of the groups that I represent find child pornography absolutely reprehensible. None of the people I represent today produce it, distribute it, or condone it. Nevertheless, the bill that we are discussing this morning will affect each and every one of the members and the groups that I am here to talk for. I therefore ask that this law be crafted with a fine scalpel and not with a hatchet.

ALA, the Freedom to Read Foundation, and the members of Media Coalition believe that by defining child pornography as the depiction of "the sexual exploitation and abuse of children," the U.S. Supreme Court in *Ferber* v. *New York* appropriately balanced the protection of children while preserving first amendment freedom.

The Court clearly sought to protect the children who are subjects of the pornographic descriptions. S. 1237, however, appears to be a sharp break with the rationale of the *Ferber* decision. It creates three new categories of prohibited material that do not involve the depiction of real minors who are being sexually abused. One category applies not to minors, but to adults. Another involves not pictures of real minors, but drawings and paintings of fictional children, and the last category applies to real minors but does not involve depictions of sexual conduct or lascivious exhibition of the genitals.

Taken together, these provisions create a new definition of child pornography that is so broad that it will exert a chilling effect on an array of constitutionally protected material. These materials range from books like the current Random House biography of Lewis Carroll to movies like "Cleopatra," "Romeo and Juliet," "The Last Picture Show," "Midnight Cowboy," and "The Prime of Miss Jean Brody."

I would like to look at these categories individually and provide you with a few examples in each. These are the problems that we are going to face in the library, publishing, and bookselling community if indeed S. 1237 goes through in the way that it is now written.

First, adults who appear to be minors. The proposed definition applies not only to minors, but to adults who "appear," to be under 18. However, adults frequently appear in movies in the roles of minors. As a result, the following could be considered to be child pornography: "Cleopatra," in which Elizabeth Taylor's buttocks are revealed during a massage, and in this instance Taylor is portraying Cleopatra as a young girl.

"The Last Picture Show" contains frequent scenes of nudity involving Cybill Shepard and other actors portraying high school students. "Midnight Cowboy" includes a flashback to the adolescent sexual experiences of the Joe Buck character. "The Prime of Miss Jean Brody" shows the naked breasts of a schoolgirl as she models for a painter. "Carrie" is a high school girl shown taking a shower, and "Equus," the story of a young boy's sexual problem, includes scenes of him in the nude.

The second category, depictions of minors who are not real, would ban under S. 1237 paintings and drawings of minors that do not even exist. For instance, the naked baby Jesus appears in thousands of paintings, and naked cherubs are ubiquitous in Renaissance art. Supplementing my written testimony are a number of

pictures that may well be suppressed if 1237 is adopted in its current form, and some of these photos or exhibits include Donnatello's "David"; Lucas Cranach's "Venus and Cupid"; School of Leonardo's "Leda and the Swan"; Correggio's "Danae"; Titian's "The Worship of Venus"; Jean Baptiste Carpot's sculpture, "Girl with a Shell"; Degas' "Spartan Girls Challenging Boys"; and Picasso's "Two Youths," one of the youths depicting frontal nudity.

The third category includes breasts and buttocks of actual minors and would affect such things as Zeferrelli's "Romeo and Juliet," which starred under-age actors, showed Juliet getting out of bed with Romeo, and showed both who are nude.

These all raise frightening questions, frightening because they are unanswerable. The questions are: When are the buttocks or breasts of a minor simply exhibited and when are they lasciviously exhibited? When does the depiction of a mature adult appear to be the depiction of a minor? When does classic art become child pornography?

This is a very serious issue. We do hope, however, and we urge you to focus on refining the definitions so that, while we do protect the children of this country, we also do not exert a chilling effect on the dissemination of books, magazines, movies, and videos that are protected by the first amendment. For this reason, librarians of the country urge you, please, to very carefully review the definitions in 1237 and to refine them so that the materials, the cultural, medical, sex education materials currently in our collections remain free and available to all the citizens of this country who need them.

Thank yo very much.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Krug follows:]

PREPARED STATEMENT OF JUDITH F. KRUG

My name is Judith F. Krug. I am the Director of the American Library Association's Office for Intellectual Freedom (ALA–OIF) and the executive director of the Freedom to Read Foundation. In these capacities, among other activities, I provide support and assistance to librarians facing censorship challenges. I am also the chair of The Media Coalition, a group of 12 national trade associations and two foundations that represents most of the book and magazine publishers, booksellers, librarians, periodical wholesalers and distributors, recording and video game manufacturers, and recording and video retailers in the United States. Today I wish to alert this Committee to the potential effects of the Child Pornography Prevention Act (S. 1237) on libraries and librarians as well as on the businesses that produce and distribute books, magazines, movies and videotapes. Librarians are deeply concerned by this bill because we offer a broad range of visual materials that might be affected. Libraries provide far more than books and magazines these days. We also loan movies and, increasingly, we offer access to the World Wide Web and the other computer networks that are known collectively as the Internet.

The ALA, the Freedom to Read Foundation and the members of The Media Coalition strongly oppose child pornography and heartily support every effort to punish those who abuse children and those who profit by their abuse. The American Library Association, founded in 1876, is the oldest and largest national library association in the world. ALA is concerned with issues which affect the more than 122,000 libraries in the United States, including public, school, academic and state libraries, as well as special libraries which serve people in government, business, the arts, the armed services, hospitals, prisons and other institutions. ALA's more than 58,000 members include libraries, librarians, library trustees, and other library supporters from every state and many countries of the world. The Association maintains a close working relationship with more than 70 other library associations in the United States, Canada, and other countries and works closely with many organizations concerned with education, research, cultural development, recreation and

public service. The Freedom to Read Foundation was created by the ALA in 1969 to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens. In addition to the Freedom to Read Foundation, the members of Media Coalition are the Association of American Publishers, the American Booksellers Association, the American Booksellers Foundation for Free Expression, the International Periodical Distributors Association, the Magazine Publishers of America, the Recording Industry Association of America, the Video Software Dealers Association, the Council for Periodical Distributors of the Americas, the National Association of College Stores, the National Association of Recording Merchandisers, the Interactive Digital Software Association, the Periodical and Book Association of America and the Publishers Marketing Association.

ALA, the Freedom to Read Foundation and the members of Media Coalition believe that by defining child pornography as the depiction of "the sexual exploitation and abuse of children," the U.S. Supreme Court in *Ferber* v. *New York* appropriately balanced the protection of children while preserving First Amendment freedom. The Court clearly sought to protect the children who are the subjects of the pornographic depictions. S. 1237, however, is a sharp break with the rationale of the *Ferber* decision. It creates three new categories of prohibited material that do not involve the depiction of real minors who are being sexually abused. One category applies not to minors but to adults. Another involves not pictures of real minors but drawings and paintings of fictional children. The last category applies to real minors but does not involve depictions of sexual conduct or lascivious exhibition of the genitals. Taken together, these provisions create a new definition of child pornography that is so broad that it will exert a chilling effect on an array of constitutionally protected material, ranging from books like the current Random House biography of Lewis Carroll to movies like *Cleopatra, Romeo and Juliet, The Last Picture Show, Midnight Cowboy* and *The Prime of Miss Jean Brody.* I will discuss these categories individually and give examples of materials that could be suppressed if S. 1237 is approved in its current form.

Adults who appear to be minors. The proposed definition applies not only to minors but to adults who "appear" to be under 18. However, adults frequently appear in movies in the role of minors. As a result, the following films could be child pornography:

- *Cleopatra,* in which part of Elizabeth Taylor's buttocks are revealed during a massage; Taylor is portraying Cleopatra as a young girl.
- *The Last Picture Show,* which contains frequent scenes of nudity involving Cybill Shepard and other actors portraying high school students.
- *Midnight Cowboy,* which includes a flash back to the adolescent sexual experiences of the character Joe Buck.
- *The Prime of Miss Jean Brodie,* which shows the naked breasts of a school girl as she models for a painter.
- *Carrie,* a high school girl, is shown taking a shower.
- *Equus,* the story of a young boy's sexual problem, includes scenes of him in the nude.[1]

Depictions of minors who are not real. S. 1237 would ban drawings and paintings of minors who are not even real. Under such a definition, the famous advertisement for Coppertone suntan lotion that shows a young girl's swimsuit being tugged off by a dog could be considered child pornography. More importantly, many of the most important artists in western civilization have depicted children in the nude. The naked baby Jesus appears in thousands of paintings, and naked cherubs are ubiquitous in Renaissance art. As a supplement to my testimony, I have included a number of pictures that may well be suppressed if S. 1237 is adopted in its current form:

- Donatello—*David*
- Lucas Cranach—*Venus and Cupid*
- School of Leonardo—*Leda and the Swan*
- Correggio—*Danae*
- Titian—*The Worship of Venus*
- Jean Baptist Carpeaux—sculpture, *Girl with a Shell*
- Degas—*Spartan Girls Challenging Boys*
- Picasso—*Two Youths*

Breasts and buttocks of actual minors. S. 1237 also expands the definition of "sexually explicit conduct," which currently outlaws "lascivious exhibitions of the genital or pubic area" of a minor, to include photographs of "lascivious" exhibitions "of the

[1] These examples are taken from the 1996 edition of *The Bare Facts Video Guide.*

buttocks of any minor, or the breasts of any female minor." Thus, any depiction of nudity involving a child could become child pornography, even if the picture shows no evidence of the minor being harmed and may well have been taken by a parent or with the parent's permission. Naked breasts and bottoms that are presumed to belong to minors are displayed in hundreds of films, including:

- Zefferelli's *Romeo and Juliet,* which starred underage actors, showed Juliet getting out of bed with Romeo; both are nude.
- Merchant/Ivory's *Room with a View,* which contained a shot of a group of males, including a young boy, running naked toward a watering hole.
- Louis Malle's *Pretty Baby,* which portrayed a young Brooke Shields as a prostitute in a New Orleans bordello.
- *Greystoke: the Legend of Tarzan* portrays the young Tarzan in the nude. S. 1237 confronts librarians, booksellers, video retailers and theater owners with frightening questions: When are the buttocks or breasts of a minor simply exhibited and when they are "lasciviously" exhibited? When does a depiction of a nude adult "appear" to be a depiction of a minor? When does classic art become child pornography? Rather than run the risk of mistakenly disseminating something that might later be declared to be child pornography and then being criminally charged, librarians and others would have no choice but to suppress as child pornography every apparent instance of nudity that might involve a minor or an adult who appears to be a minor.

I know that supporters of this bill will object that we are being alarmist. After all, only works that depict child nudity in a "lascivious" manner would be banned. But lasciviousness is a vague concept in this context. What constitutes a lascivious display of a buttock or a breast? What did Donatello and Michelangelo have in mind when they decided to depict David in the nude? What are Picasso's two boys doing together in the nude anyway? These may seem like frivolous questions, but they define the difficulty that librarians and others would face in deciding whether a book is a work of art or a piece of child pornography.

Nor am I being an alarmist when I say that the only way a librarian can resolve this question is by suppressing the art work. Even if the chance of prosecution were small, a librarian would censor the work out of a fear that she might be attacked for making it available in her library. The libraries of this country are a target of constant attack because they carry a wide range of materials that inevitably includes works that offend people. At a time when we are fighting to keep books like *Adventures of Huckleberry Finn,* Maya Angelou's *I Know Why the Caged Bird Sings* and John Steinbeck's *Of Mice and Men* on the shelves, it is inevitable that the passage of S. 1237 would lead to demands for the suppression of many of the works that we have discussed today. Sex education material, which increasingly uses realistic looking human forms, would also come under attack. No one should force these materials on unwilling parents. On the other hand, the critics of sex education should not be handed a weapon that would make it possible for them to describe these works as child pornography. Librarians are strong defenders of First Amendment rights, but even the stoutest defender of constitutional liberties would have trouble defending herself from the charge of disseminating child pornography.

S. 1237 appears to mark a clear departure from *Ferber.* Instead of targeting actual depictions of the sexual abuse of minors, it seemingly wishes to diminish the output of any material that might appeal to those who abuse minors, it seemingly wishes to diminish the output of any material that might appeal to those who abuse minors, even when this material has serious literary, artistic, political or scientific value for the rest of the community. The Supreme Court has already rejected one effort to ban material because it had a harmful effect on susceptible individuals. In the *Roth* case, the Court observed:

> * * * [J]udging obscenity by the effect of isolated passages upon the most susceptible person, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of freedoms of speech and the press. *Roth* v. *U.S.,* 354 U.S. 476, 489 (1957).

It is for this reason that the current test requires that obscenity be weighed according to the standards of the "average" adult. It is impossible to place limitations on material that may appeal to those who sexually exploit children without forfeiting the freedom guaranteed to all "average" citizens.

The suppression of child pornography is an important social goal, but it will only be realized by focusing on depictions of real minors being sexually exploited and abused. To define child pornography more broadly would dilute the effort to protect children, while exerting a chilling effect on the dissemination of books, magazines, movies and videos that are protected by the First Amendment. For this reason, the librarians of the country urge you to oppose S. 1237 in its current form.

Thank you.

As I indicated in my testimony on June 4, 1996, librarians, booksellers and others may be forced to suppress great works of art if S. 1237 is adopted in its current form. The key issue is what is a "lascivious" depiction of the buttocks or genitals? I will illustrate the problem by using the exhibits of paintings and sculptures that were attached to my testimony.

1. Donatello's *David*

Description: This is a statue of an under-age male who is nude except for helmet and footgear. One hand holds a sword; the other is posed on his hip.

Cause for Concern: Under S. 1237, librarians would have to ask themselves if pictures of this statue are lascivious. Why has Donatello (or Michelangelo) decided to depict David in the nude? Is there something seductive in the way he stands with his hips thrust to one side? Is his hand posed on his hip to draw attention to his genitals?

2. Lucas Cranach's *Venus and Cupid*

Description: This is a painting of a young, naked Venus. A naked Cupid is kneeling down, gazing up at Venus.

Cause for Concern: Venus is the goddess of love; Cupid is the winged messenger of love. Can a portrait of them in the nude be anything except lascivious, particularly when Cupid appears to be gazing at Venus' genitals?

3. School of Leonardo's *Leda and the Swan*

Description: This is a painting of a young, naked Leda, embracing a swan representing her lover, Jupiter. Their two naked children are at their feet.

Cause for Concern: Leda is naked, the children are naked, and the swan is a symbol of a sexual union.

4. Correggio's *Danae*

Description: This painting portrays a young, naked Jupiter, with his genitals exposed, pulling a sheet off the nymph Danae, who is naked from the waist up, with her breasts exposed. There are also two naked babies in the picture.

Cause for Concern: This painting portrays the kidnaping and seduction of the nymph Danae by Jupiter. Clearly, the two, who appear to be minors, are about to have sex. A librarian would have to assume that it is lascivious.

5. Titian's *The Worship of Venus*

Description: This painting depicts a riot of activity by a crowd of naked cherubs.

Cause for Concern: Venus is the goddess of love. The conduct of the cherubs can be seen as sexual play, the celebration of love, lust, and sexual desire.

6. Jean Baptist Carpeaux's *Girl with a Shell*

Description: This statue depicts a naked, pre-pubescent girl with a shell on her head.

Cause for Concern: Many people would find that a depiction of a naked girl whose arms are raised, giving a clear view of her naked chest as lascivious.

7. Degas' *Spartan Girls Challenging Boys*

Description: This painting depicts a field filled with young girls and boys running and playing in an adolescent game. The girls are naked from the waist up; the genitals of one boy are fully exposed.

Cause for Concern: The painting portrays the flirtatious behavior and amorous combat of minors. Sexual activity is its subject. There is a good chance that some would consider it child pornography under the definitions of S. 1237.

8. Picasso's *Two Youths*

Description: This painting shows two adolescent males; one standing with his genitals exposed.

Cause for Concern: Why are these two nude boys together: What are they doing? Since there is no clear answer, a librarian would have to suppress the painting out of a fear that someone would consider it lascivious.

97. Lucas Cranach (1472-1553), VENUS AND CUPID. A carnal and mannered vision by this great master of the German Renaissance.

98. School of Leonardo (16th century), LEDA AND THE SWAN. This work represents Leda and Jupiter, transformed into a swan; from their union Castor and Pollux were born.

100. Correggio (c. 1489-1554), DANAË. This painting portrays the legend of the nymph Danaë whom Jupiter tried to kidnap by transforming himself into golden rain.

Worship of Venus, 1518–1519

Spartan Girls Challenging Boys, about 1860–62
Petites filles spartiates provoquant des garçons
Oil on canvas, 109 x 155 cm
London, The National Gallery

The CHAIRMAN. Mr. Taylor, we will end with you.

STATEMENT OF BRUCE A. TAYLOR

Mr. TAYLOR. Thank you, Senator and members of the committee. I did anticipate that there would be arguments against the constitutionality of the bill and I submitted a somewhat lengthy brief-like discussion of *Ferber* and some of the other Supreme Court decisions because as Professor Schauer said, *Ferber* was based solely on real children being used in real child pornography.

However, as the Supreme Court has often said, when they decide a case they only decide the case before them. They do not issue a rule that is broader than necessary to decide that narrow case. So you don't look at old cases and say, well, that is as far as it goes. As a matter of fact, in *Ferber* they say several times, as they do in other cases, we are limiting this to this, but we are not saying that is all you can do. I think that *Ferber* and a latter case, *Osborne*, in 1990, give us guidance that says this law that you have drafted, Senator, is going to be constitutional because times have changed in exactly the same directions that the Court anticipated in 1982 in *Ferber* and accepted as almost there in *Osborne*.

In *Osborne*, for the first time they upheld the Ohio possession of child pornography law. The same arguments were made that, well, it has to be obscene; you can't ban mere possession; that is protected speech. The Court upheld it because they said we have to do something more to dry up this child pornography problem because the bill we sustained in *Ferber* didn't do the whole job, and we now know that pedophiles are using child pornography to seduce other children.

So in *Ferber*, where they said child pornography can be made illegal whether it is obscene because it is a permanent record of child abuse and it is a psychological trauma to the abused children, in *Osborne* they add a new issue that is the one I think this bill is primarily aimed at, and that is child pornography has become not just a crime scene photo of child abuse; it has become a criminal tool of tomorrow's child abuse. That is what this bill needs to do.

This bill says if it is real or apparent in such a way that you can't tell the difference, then how would a child who is being shown a picture and being seduced or a pedophile who uses a picture to get excited, or indeed a library that has a picture in front of them that looks like it is a real kid having sex—if you can't tell the difference, then there isn't any difference. If this bill says if it is so real or apparent, then it will be treated as if it is real. That, I think, you can do within existing constitutional frameworks. There are some ways to minimize the damages.

Ms. Krug mentions that, well, we have paintings in classic art. That is not, in my judgment, included within this bill. This bill says it has to be real or apparent acts of a child engaging in sex. A painting—Donnatello, Picasso, Michelangelo's "David" sculpture and paintings—they don't look like real children being abused. They don't cover the kind of conduct that this bill reaches and they aren't going to be the kinds of materials that this bill would be interpreted by the courts or the Government to apply to. So, that is not going to be the problem.

There are some ways that the impact of the bill could be made less scary to the industry or to the library community, and one of those is what I have suggested in my written statement, which was an affirmative defense that doesn't give a defense for all child pornography, but does give a defense for real fake child porn.

As we move from "Max Headroom," which was kind of a grainy computer cartoon, to "Jurassic Park," which looks better, and then the new movie that Sean Connery is going to play the voice of the dragon—it is totally computer-generated. The red barn in "Twister" is completely generated. It is not going to be too far away when we are going to have to admit that the naked eye and even some technology can't tell the difference between the real and the fake.

So if you had a 20-year-old Polaroid photograph and a defendant gets on the stand and says you can't tell if that is real anymore because computers can do as good a fake now, that poses two problems. No. 1, we now know that real and apparent child porn are equally dangerous to children. No. 2, we also know that we are, in a sense, having computer technology build in a good-faith or a reasonable-doubt challenge to even existing law.

Right now, if you just increase the penalty for obscenity when it looks like it is kids, how do we know which pictures to charge as obscenity and which ones to charge as child porn? We take a picture that looks real and we prosecute it as child porn. The defendant gets up and says, I made this on a computer. Jeopardy is attached to that. What do we do about that?

The problem isn't to weaken existing law. Yes, you do need to increase the penalties for obscenity, but you can add a defense for real fake child porn that may look real but is totally computer-generated so no children get abused, but limit its use only for scientific and medical and serious uses, like they do in Ohio. The Supreme Court mentioned that in the *Osborne* case. The Canadian and the English laws have such a defense. That wouldn't make a defense for actual child porn that is being used by other people, but it would make it so that if a library or if a teacher or a school or a doctor needed child sexuality pictures for scientific reasons, they could have the new computer-generated stuff to do the same thing without involving the abuse of children.

I also agree, as Justice did, that we need to change the possession statute so that it means 3 pictures, not 3 volumes containing pictures. I did a trial up in New Hampshire where the defendant said, well, my client had a lot of pictures and he gets to go to jail, but the Federal law says if he had had 2 volumes of 1,000 pictures each, the Federal Government would have thought that was just fine. So, that is a problem where we have a book with 1,000 pictures as one item and you need 3 of those items, whereas 3 Polaroids is a Federal felony. So the possession law, I think, should be changed to 3 visual depictions.

There are a couple of other technical amendments that I offered, including an intent statement by Congress and an advertising statute. But one of the things that might fill the gap, in addition to the real or apparent crime that your bill defines, is a section of the bill that would allow a jury or a judge to infer from the circumstances that what looks real is real. That would apply even under existing law so that if the day came, and even if this law

didn't pass as to the apparent child porn, at least we could bring in a picture that looks real and the jury could use their own judgment as to whether it is real until someone can prove it is not.

I think that Congress can criminalize apparent child pornography that looks so real that you can't tell the difference. That would protect the libraries and it would also redefine a class of speech, meaning such good counterfeit child porn that it is as dangerous to tomorrow's molested children. That is the kind of conduct I think the Court anticipated as being non-protected speech, and I think the law would be upheld because of the pure necessity of us doing it.

The CHAIRMAN. Thank you, Mr. Taylor.

[The prepared statement of Mr. Taylor follows:]

National Law Center for Children and Families
"NLC"

TESTIMONY OF BRUCE A. TAYLOR
President and Chief Counsel of the
National Law Center for Children and Families
on
S. 1237,
The "Child Pornography Prevention Act of 1995"
before
The Committee on the Judiciary
of the
United States Senate
on
June 4, 1996

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Mr. Chairman and Members of the Committee:

On behalf of the National Law Center for Children and Families, we first wish to thank Senator Hatch for his sponsorship of this absolutely crucial piece of legislation.

It is this attorney's opinion, as a former prosecutor and as NLC's Chief Counsel, that Senate Bill 1237 is and would be found valid and constitutionally enforceable and that it is an essential and necessary modernization of the federal child sexual exploitation law.

It is our understanding that the intent of the sponsors of S. 1237 is to change the existing federal child exploitation statute, 18 U.S.C. § 2252, into both a child pornography statute as well as a child sexual exploitation law. In this regard, the bill is truly a child sexual exploitation prevention measure. To do this, the bill provides a new definition of "child pornography" as that which actually depicts the sexual conduct of real minor children and that which appears to be a depiction of a minor engaging in sexual conduct. This "real" or "apparent" child pornography is a defined category of non-protected material that is made contraband because of its inherent danger to children and because it has no serious value to society that could justify Constitutional protection. As suggested below as a specific statement of Congressional intent to be added to the bill, the effect and scope of the bill can be summarized as criminalizing all "child pornography":

It is the intent of Congress that this section prohibit the production, creation, distribution, traffic, and possession of images of child sexuality that appear to be of real minors engaging in sexually explicit conduct, even when or though the images were produced using adult models or performers or where wholly or partially generated or altered by computer, photographic, photocopy, or by any other technical or artistic means, when such material either is or gives the appearance of being an actual photo or other reproduced image of an actual child engaging in the specified sexual activities or having his or her specified sexual body parts lasciviously exhibited, even if the visual material was false, forged, counterfeited, or altered so as to intentionally or knowingly appear to be real.[1] It is intended that, when material which appears to be real child pornography is made or transported or possessed, in or affecting or by means of interstate or foreign commerce, such acts are criminal and such real or apparent or counterfeit child pornography is contraband.

However, before further discussing the legal, law enforcement, and child protection aspects and importance of this bill, the following suggested changes and additions to the bill (highlighted in bold) are recommended to clarify and strengthen its provisions:

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1 Many of the words used to express the appearance of reality are also found in federal counterfeiting and false representation statutes involving money, securities, stamps, court seals, passports, goods or services, etc. See 18 U.S.C. §§ 470-513, §§ 2318-2321. The mere possession of the tools or paraphernalia to accomplish counterfeiting is illegal, § 474, 492, as is possession of "similar paper" to money or an "essentially identical" feature of a counterfeit deterrent, § 474A.

Part I

THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES OFFERS THE FOLLOWING CHANGES TO S. 1237:

(1) That SEC. 3 of the bill, "Definitions", which amends paragraph (2)(E) of Section 2256 to add minors' buttocks and minor female breasts to the private sexual body parts protected from sexual exploitation by being lasciviously exhibited, be re-worded to clarify that such body parts are also qualified by the requirement that they be depicted as a "lascivious exhibition", by removing the internal commas that presently appear in the bill language and by specifying that it is only post-pubertal, fully or partially developed or developing, juvenile breasts that are to be included within the scope of the statute, by changing the wording of the bill to read as follows:

(1) in paragraph (2)(E), by inserting before the semicolon the following: "**or the buttocks of any minor or the post-pubertal breast of any female minor**".

(2) That Section 2256 be further amended by adding at the end the following separate definition of a crucial term used in the new definition of "child pornography" in proposed subsection 2256 (8):

(9) "appears to be" means a visual depiction or visual representation that is a realistic or apparent likeness or similitude of, or is essentially and visually identical to, or is a realistic and lifelike imitation of, a visual depiction of a minor engaging in sexually explicit conduct, even though it is not or may not be a true visual depiction of an actual minor person who is or was physically engaging in the sexually explicit conduct depicted

(3) That SEC. 4 (a) of the bill, "Prohibited Activities...", which amends the elements of Section 2252, be corrected and

made consistent by including the receipt and distribution, in § 2252 (a)(2)(B), as well as the sale and possession for sale, in newly renumbered § 2252 (a)(4)(B), of child pornography that has been produced using raw materials or components or equipment that has been mailed or passed through the streams of commerce, and that such provision be put back into the existing crime of possession of child pornography, renumbered as § 2252 (a)(5)(B), so that each subsection defines a crime of trafficking in child pornography that has been mailed, transported in interstate or foreign commerce, or was made using materials that were mailed or so shipped, thus making the bill consistent with the elements of existing law now found in subsections 2252 (a)(3)(B) and (a)(4)(B), and that the possession law in newly renumbered § 2252 (a)(5)(B) be made more effective and enforceable by specifying that it is three pieces of child pornography, rather than three containers that could contain hundreds of child pornographic images each, by changing the bill to read as follows:

[change the proposed subsection 2252 (a)(2)(B) to read--]

"(B) any material that contains child pornography that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, **or that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer,**

[change the proposed subsection 2252 (a)(5)(B) to read--]

"(B) knowingly possesses 3 or more **pictures, photographs, visual depictions or images,** books, magazines, periodicals, films, videotapes, computer disks, or other material that contains any child pornography that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, **or that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer,**

(4) That Subsection 2252 (a) be further amended to create an additional new offense of advertising child pornography, similar to the crime of advertising obscene material through the mails in 18 U.S.C. § 1461 [paragraph 4], by adding at the end of § 2252 (a), as amended by this bill, the following new paragraph:

> **(6) knowingly transports, ships, receives, distributes, or sells, or possesses with intent to do so, any advertisement or notice of any kind that gives information, directly or indirectly, where, or how, or from whom, or by what means any child pornography may be obtained or received, in or affecting or by any means of interstate or foreign commerce or the mails,**

(5) That an evidentiary inference be added to Section 2252 to provide that a judge or jury may judge the minority of the persons engaging in sexual conduct by examination of the material itself and by considering any evidence that the material was "pandered" or represented as child pornography and by considering the evidence of knowledge or *scienter* that would put a reasonable person on notice of the minority of the persons appearing in the material. Such an inference could be worded as follows (which is a combination and adaptation of similar provisions found in state laws such as the Ohio Revised Code, § 2907.322(B)(3), and the Kentucky Penal Code, § 531.330) and be designated § 2252 (c):

> **(c) In a prosecution under this section, the trier of fact may infer from the direct or circumstantial evidence that a person in the material is a minor if such person appears to be a minor or if the material or its title, text, visual representation, marketing, description, or other circumstances of creation, receipt, distribution, transportation, or possession represent, depict, imply, pander, or otherwise indicate that the person is a minor. The trier of fact may also infer from the direct or circumstantial evidence that a person in the material is a minor if the facts surrounding the creation, receipt, distribution, transportation, or possession would cause a reasonable person to know or have reason to know that the**

person depicted is a minor. Such inferences may be rebutted by competent evidence that the person was over the age of eighteen years or that a reasonable person would know or have reason to know that the person was not a minor.

(6) That Section 2252, as amended by this bill, be further amended by the addition of an explicit notice of Congressional intent to guide interpretation and understanding of the application of the amended section, by adding at the end the following new subsection 2252 (c):

(c) It is the intent of Congress that this section prohibit the production, creation, distribution, traffic, and possession of images of child sexuality that appear to be of real minors engaging in sexually explicit conduct, even when or though the images were produced using adult models or performers or where wholly or partially generated or altered by computer, photographic, photocopy, or by any other technical or artistic means, when such material either is or gives the appearance of being an actual photo or other reproduced image of an actual child engaging in the specified sexual activities or having his or her specified sexual body parts lasciviously exhibited, even if the visual material was false, forged, counterfeited, or altered so as to intentionally or knowingly appear to be real. It is intended that, when material which appears to be real child pornography is made or transported or possessed, in or affecting or by means of interstate or foreign commerce, such acts are criminal and such real or apparent or counterfeit child pornography is contraband.

If such an expression of Congressional intent is not added to the statute itself, it can and should be included in the bill as an explicit statement of intent, as are the findings contained in SEC. 2. of the bill, or at least in a committee report accompanying the bill. Such a statement would put the public on notice and guide the courts as to the legislative intent of the newly reworded and structured elements of Section 2252, as amended.

(7) That a limited affirmative defense be added to Section 2252 for the use of false child pornography for *bona fide* legitimate purposes (parental, medical, scientific study, law enforcement, etc.). Such a narrow "good faith" defense should be patterned after the Ohio statutory exception relied on with approval to find that State's possession of child pornography law constitutionally valid and not overbroad. The defense can be limited to those instances where the particular defendant can affirmatively prove that the apparent child pornography was, in actual fact, not real but wholly false or counterfeited by computer or otherwise and that no actual minor persons were used, in whole or part, in the production or reproduction of the visual images that appear to constitute child pornography. In order to avoid any implied intent to require the Government to prove, at the grand jury or trial stages, that the exclusion does not apply to the particular facts of the case, it is strongly recommended that the "good faith" clause be made an affirmative defense, rather than a general exception. The protection for the legitimate purposes would clearly be available when truly warranted, but the burden would be on the defendant to show his or her legitimate right to the use of such otherwise dangerous child pornographic material. The suggested defense could be a new subsection 2252 (d):

> **(d) It is an affirmative defense to a charge under this section, when the material involved which appeared to be child pornography was in no part created or produced or reproduced by the use of any actual minor person, that the material was transported, shipped, received, distributed, sold, or possessed for a bona fide medical, scientific, educational, religious, governmental, judicial, law enforcement, parental, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, law enforcement officer, parent or guardian, or other person having such a proper purpose in the serious value of the particular material under the circumstances.**

Part II

S. 1237 IS NECESSARY AND CONSTITUTIONAL

THE BILL IS NEEDED TO PRESERVE PRESENT LAW:

Computer, photographic, and photocopy technology is amazingly competent at creating and altering images-from humans who can be "morphed" to money that can be copied. Computer and photo images, two and three dimensional imaging, and holograms, can and will be made to look so real that the eye cannot tell the difference. The marketplace is already being promised that "virtual reality" computer "trips" will fool the senses and look and feel real. This bill treats material as contraband "child porn" only when it is or looks so real that one is indistinguishable from the other. If a computer generated counterfeit picture of a child engaged in sex is so good a fake that you cannot tell by looking at it, then police, courts, and indeed pedophiles and seduced children would also be unable to know the difference. The real and the apparent become and are equally dangerous because both have the same incitement effect on the pedophile and the same seductive effect on a child victim.

In this regard, the phrase "real child pornography" takes on less meaning in real life than it does as a grammatically correct characterization of child porn that was produced with real children. Tomorrow's victims and their parents, and all of us, can see that child pornography is child pornography. It is irrelevant whether it is "real" or

"apparent", whether it is an actual crime scene photo or is a realistic fake or counterfeit recreation of one.

Technology may have made it possible for criminals to escape responsibility for violating the existing law, even when the pictures are of real minor children being sexually abused or exploited. The day will soon arrive, if not here already, that our inability to distinguish the real from the apparent or counterfeit fake child pornography will raise a reasonable doubt that a picture is really what it appears to be, a photo of a real child being molested and exploited. This is equally true whether the material is genuine or not, whether it is a 20 year old picture or yesterday's computer or photo-magic creation. If the Government must continue to prove beyond a reasonable doubt that mailed photos, smuggled magazines or videos, traded pictures, and computer images being transmitted on the Internet, are indeed actual depictions of an actual minor engaging in the sex portrayed, then there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution. The inability to find all the children or identify the source of all child porn pictures, real or apparent, plus the ability of technology to confound both the eye and any definitive analysis, makes such proof "difficult, if not impossible" and should justify the measures taken in this bill.

This is not hypothetical hysteria on the part of paranoid police and prosecutors. The argument has already been made that computers can create such good fakes that the

jury should not feel sure that they can determine whether the pictures in a computer bulletin board case are even real. In the trial of *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), a defense witness was called to offer expert testimony that computers could generate pictures of children that were undetectably identical to actual child pornography and, therefore, the jury could not be sure that the pictures in that case were of actual children, which were downloaded in Texas by the Defendant from a BBS in Denmark.[2] The jury convicted and the judgment was affirmed, but the problem is illustrated nonetheless.

Under present law, the Government must prove that every piece of child pornography, photo or computer image, is of a real minor being sexually exploited and the trier of fact must so find. It has been true up to this point in history that no painting or artistic skill or early computer graphics techniques could create an image that was imperceptably indistinguishable from an actual person engaged in past

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2 The defense witness owned a graphic arts company specializing in computer graphic production, who testified that photographs can be altered by computers so that a viewer, including him, could not, with any certainty, determine whether a computer image is an image of a real person or not. (See Vol. 6 of the Record on Appeal, 6 RA 286-301, 319.) The District Court charged the jury in the language of §§ 2252 & 2256 that the defendant must have knowledge that the material depicted at least one minor engaging in sexually explicit conduct and that the computer "GIF" pictures (Graphic Image Format" images) were of real minors engaging in sex. The jury so found, despite the attempt at confusion offered by the defense expert witness. It is conceivable that the day is here or near when common knowledge proves that computers can do the slight of hand that tricks the eye and confounds the mind of the viewer.

actions. The material could and did "speak for itself" without the need for expert testimony. How long this remains cannot be said with certainty, so Congress should anticipate this problem with the solution proposed in this bill.

OBSCENITY LAWS ARE INADEQUATE AS A SOLUTION:

The argument will be made that the Supreme Court in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), upheld the New York distribution of child pornography law absent an obscenity test requirement and the Ohio child pornography possession law on narrow grounds involving the direct sexual abuse of actual minors, but this can not end the inquiry. The precedent of those cases is narrow, but the precedential value is broad. Congress must identify an equally valid governmental interest to justify the reach and scope of the law under consideration, and the facts presented and the reality of modern technology supply just such a justification for this bill. Indeed, the present state of the law in the face of available means of violating it and avoiding conviction under it demand and make this bill a necessity if the federal law is to survive at all.

The decisions in *Ferber* and *Osborne* are narrowly focused on the specific facts of those convictions, as they must be, but the rationale expressed by the Court in those cases applies to the rational basis upon which Congress now finds itself compelled to change the present child exploitation statute into tomorrow's child pornography and child

exploitation statute.

For instance, the Court in *Ferber* discussed its judgment that child pornography need not be obscene to be classified as non-protected contraband by reference to the sexual molestation and psychological trauma of children who appear in child pornography that is made of them. The Court did not discuss other factors justifying its conclusions or other circumstances that may also qualify for a similar judgment. This is a result of the long-standing rule of judicial review, that a court only rule on the case or controversy before it and only announce a rule narrow enough to resolve that controversy. As stated in *Ferber*, 458 U.S. 767 n. 20:

> In addition to prudential restraints, the traditional rule is grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies. "This Court ... is bound by two rules, ...one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. [citations omitted]"

Even with this qualification on the language of the Court's decisions upholding child exploitation laws in the past, a look at the conclusions drawn illustrates a reasoning that would apply to uphold the child pornography proposed by this bill, especially as we move from *Ferber* to *Osborne* for guidance on how to define a class of material that should lie outside the protection of the First Amendment.

THE OSBORNE DECISION SUPPORTS THE BILL:

The Court in *Osborne* upheld an Ohio law that criminalized the mere possession of pictures of children engaged in sexual activity or having their genitals lewdly exhibited so as to pander to the prurient interest of pedophiles.[3] The Ohio law appeared to contradict the holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), that protected the private possession in one's home of obscene material, but the Court held the law valid for some of the same reasons this Congress is considering the instant statutory change. The Court noted that *Stanley* had offered the "illicit possession of defense information" as a type of "speech" that compelling state interests might justifiably ban and that *Stanley* "did not suggest that this crime exhausted the entire category of proscribable offenses." *Osborne* at 110 n. 5.

The Court concluded that circumstances had made it imperative that the states be allowed to criminalize the possession of child pornography. As stated in *Osborne* at 110-11:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all

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[3] The Ohio Supreme Court construed the child nudity section to apply only to that which is "*not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes." *Osborne*, 495 U.S. at 113 n. 10. The Ohio law also has a "bona fide" purpose defense which excludes artistic, scientific, and parental use of nude pictures of children and another defense which excludes legitimate scientific uses of child sex materials. These exceptions were also relied on with approval by the U.S. Supreme Court in finding the possession statute not to be overbroad.

levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. ***

Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.[4] ... The State's ban on possession and viewing encourages the possessors of these materials to destroy

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[4] This justification applies equally to the "composite" child pornographic materials that are also present in the pedophile underground, where a real child's head is superimposed onto the body of another child or adult and shown as engaging in sex. The children so used know that such a picture bearing their face and/or body is in circulation as a stimulus for other pedophiles to molest other children and is used to seduce or coerce other child victims into being molested or exploited. The recent conviction in Strafford County Superior Court in Dover, New Hampshire, of Phillips (Andover) Academy teacher David O. Cobb for several hundred composite photos he had of children's heads imposed onto pornographic pictures of adult bodies. Mr. Cobb made those pictures of children into pornographic images of the children engaging in the sex acts depicted and his conduct can and should come within the reach of § 649-A:3 of the New Hampshire Criminal Code as "any visual representation of a child engaging in sexual activity." Mr. Cobb "pandered" or intended his pictures to represent a child engaging in the sexual activity and he made his materials into unprotected "child pornography." This is no less than the intended "pandering" of otherwise non-obscene material into becoming "non-mailable" obscenity that justified the conviction of the defendant in Ginzburg v. United States, 383 U.S. 463, 466, 467-68, 470-71, 475-76 (1966), the Court's famous "pandering" case. The totally or partially generated pictures of child sex acts, as covered by this bill, would cause the same mental cruelty and invasion of privacy of minors, and be as great a danger to other minors, as so-called "real" child pornography. This further illustrates that the line between "real" and "apparent" or "pseudo" or "composite" child pornography is now blurred out of existence, or maybe clarified into focus, so that we now know that "child porn" is "child porn" to pedophiles and their child victims.

them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.[7]

7. The Attorney General's Commission on Pornography, for example, states that "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." 1 Attorney General's Commission on Pornography, *Final Report* 649 (1986) (footnotes omitted). See also, D. Campagna and D. Poffenberger, *Sexual Trafficking in Children* 118 (1988); S. O'Brien, *Child Pornography* 89 (1983).

The rationale for sustaining the changes in present law that are proposed by this bill has already been recognized by the Court, as seen in 1990 in *Osborne* in recognizing that new tools of law enforcement had become necessary in the eight years since *Ferber* was decided in 1982 to deal with the "child pornography problem." The problem is exacerbated today by the super-counterfeiting and apparent reality creation ability of computers, photographic and photocopy technology, laser and hologram imaging, and other technical means not yet in use (or even part of some pedophile's bad dream yet). One point is clear, the Court in *Osborne* has recognized the inherent danger that all child pornography poses to other children.[5] This must be factored into a

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5 As discussed below, and as noted by the Court in footnote 7 of *Osborne*, law enforcement and social science agree on the inherent harm that child porn poses to future child victims. For the diagram and text (p. 89-90) of Dr. Shirley O'Brien's book that shows the use of child porn to seduce a child, referred to by the Court above, see those pages attached as an appendix to this Statement. See also the comments of Dr. Judith Reisman of the Institute for Media Education on the growing problem of computer and various

reading of the more personal justifications and market suppression aims that supported the *Ferber* decision, as discussed below.[6]

THE FERBER DECISION SUPPORTS THE BILL:

The Court in *Ferber* upheld a novel New York law that dispensed with the obscenity test of *Miller v. California*, 413 U.S. 15, 24-25 (1973), and banned the production and promotion of any picture of a child engaging in sexual conduct or lewd exhibition of the genitals. The Court began its discussion by repeating the reason that "obscenity" was found to be one of the "well-defined and narrowly limited classes of speech" that have no Constitutional protection: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

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forms of child pornography as a new and dangerous stimulus for pedophiles and threat to children, attached as pp. 11-12 of the *Brief of Amicus, The Institute for Media Education* in *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994).

6 Child porn was previously well-characterized as "crime scene photos" of child abuse in process and in pictures [the credit for which belongs to Mr. Alan E. Sears, former A.U.S.A. (E.D. Ky.) who served the Attorney General as Executive Director of the A.G.'s Commission on Pornography and authored much of the *Final Report* of 1986]. Today, child porn is also rightfully characterized a criminal tool for child abuse and exploitation. It is a tool of incitement for pedophile molesters and a tool of seduction for child victims. Its relationship and involvement with physical, criminal conduct is inseparable. It is not speech, whether real or false (any more than counterfeit money is real money even though it looks real and can even be spent to buy goods and services).

Ferber at 754. The Court then upheld a law making all "real" child pornography unprotected, regardless of whether obscene, saying:

> For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.
>
> *First*. ... [A] State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." ... The prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance. ***
>
> *Second*. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials...are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed...it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies.[7] ... The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.[8] ***

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[7] Just as it is and will be difficult, if not impossible, to distinguish child pornography that is real from apparent, true from counterfeit. We will be equally unable to halt traffic in child pornography and prevent future molestation and exploitation of real children if we are to pursue only real pictures of child abuse. It must be remembered that the Court decided *Ferber* fourteen years ago. In 1982 we did not have the wizardry of the Internet and World Wide Web, there were no Pentium processors, it was before "desktop publishing" reached every desk top, before we moved from the obviousness of "Max Headroom" to the not-so-obvious "Jurasic Park," and before color copiers could be made to copy money so well that the U.S. Treasury was forced to redesign our currency and its paper to try to make counterfeiting more difficult (even if not impossible).

[8] As the Court quoted a New York lawmaker in *Ferber*, at 761: "It is irrelevant to the child [who has been abused]

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials....[9] ***

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.[10] ***

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[11]

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whether or not the material...has a literary, artistic, political, or social value." It is equally irrelevant to a molested child who is shown fake child porn that appears to be real so as to have the same seductive effect on the child and the same incitement effect on the molester. The molester or pedophile may not even know the difference, nor would he care. Whether real or apparent, it is child pornography and just as obviously dangerous to the future "well-being" of our children.

9 The Court also said, at 762, that constitutional immunity was not extended to materials that are "used as an integral part of conduct in violation of a valid criminal statute". This bill is aimed at real and apparent child porn that is and will continue to be used to incite pedophiles to molest real children, to seduce real children into being molested, and to convince real children into making real child pornography.

10 There is no value, likewise, in child porn that is indistinguishably child porn, whether real or fake. The Court, at 763, did note, however, that an artist could use a "younger" looking model "if it were necessary for literary or artistic value" and another alternative could be "[s]imulation outside of the prohibition of the statute". This may have been a valid thought when the only child porn in existence was "real", but that cannot be said to hold true for the future. The way to preserve the hypothetically possible, but "exceedingly modest, if not de minimis" need for child sex pictures, is not to weaken the law's protection for children, but to provide a limited defense for the use of the "fake" child porn for serious value and *bona fide* purposes, as suggested above.

11 The conduct depicted in the material made criminal under this bill is a lewd depiction or representation of a child engaging in sexually explicit conduct. There is no

The one statement in *Ferber*, at 764-65, that must be met with a legislative record in the Congress to prove the need to depart from its assertion is the Court's comment that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." The Court, in 1982, retained protection for that which was outside the plain reach of the New York statute under review, as it had to under Article III, but this does not prevent Congress from "classifying child pornography [whether real or apparent] as a category of material outside the protection of the First Amendment" in order to accomplish the same goals recognized fourteen years ago that the New York legislature sought to meet by removing the obscenity test from the child exploitation crime. Child pornography has become a crime of

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difference between the content of "real" child porn from the counterfeit child porn made contraband by this bill. As the Court continued, 458 U.S. at 764: "When a definable class of material...bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." The Court could just as likely say the same thing about the "child pornography" outlawed by this bill, which bears no less heavily on the welfare of the next generation of children who will be sexually abused and exploited by the harmful effects that both real and good counterfeit child pornographic images have on pedophile molesters and their child victims. There is just as much welfare to protect for those children who will be affected by the production of child porn, whether produced in past abuses or in a computer, as those who were "engaged in its production" in the past.

its own that is inextricably linked with and a part of the maintenance of the market, the continuation of the abuse, and the danger to society inherent in its continued existence.

It will be argued that Congress cannot and should not depart from the obscenity requirement for that child porn which looks real but really is not real. Some will argue that Congress should make the representation of child sexuality the basis for penalty enhancement under the obscenity laws. Such pictures, they will argue, would be found obscene in any event, so the law already has a remedy and Congress could merely increase the sanction if the remedy was thought inadequate. Such an argument was similarly made by the defendants in *Ferber* and *Osborne* and rejected in favor of the greater good of protecting children and because the conduct of those defendants was clearly criminal. The important reason to reject such an argument today for this Senate bill is that the obscenity alternative assumes that the police, courts, and juries could tell which material to find "real" child porn and prosecute under § 2252 and which child porn was merely "apparent" and should be prosecuted under § 1460, *et seq*. Since this bill only encompasses real or apparent child pornographic images that are indistinguishable, it would be after a defendant was caught and brought to trial that the real nature of the material was discovered. The harm to children would already have been done. The existence of that material in the hands of all the other pedophiles and molesters who obtained it before or

after the trial would ensure the picture's continued existence as a "clear and present danger" to other children who will be victimized by pedophiles who are excited by the picture and incited to action against a child, as well as those children to whom the picture is shown as a tool in their seduction. Those victims will not know of the true nature of the photo, they will not know that some defendant proved that he made it on a computer, they will not know that it was found not to be "child porn" under the child exploitation statute. It will be "irrelevant" to all future child victims that the picture was the subject of an "obscenity" conviction, if it ever was or could be (given the Double Jeopardy Clause).

PROPER PURPOSE DEFENSE vs. "PANDERING" AS PRURIENT:

Congress could, and probably should, add a limited defense to exclude the truly legitimate uses of child sexuality pictures that truly are "good fakes". If there is any need for such child sex material for medical or educational purposes, then the affirmative defense suggested above would preserve the ability to serve that serious purpose with counterfeit child porn that would not involve the actual victimization of a minor in the past and its use would be limited to such serious work so that the material cannot be used or publicly disseminated so as to become a danger to other children either. Central to the proper use of such a defense is its unavailability where the material is

"pandered" as child pornography. As relied upon by the Court of Appeals in *United States v. Knox*, 32 F.3d 733, 747 (3rd Cir. 1994), on remand from the Supreme Court, ___ U.S. ___, 114 S.Ct. 375, 126 L.Ed.2d 325 (1993), child pornography in the form of "lascivious exhibition of the genitals or pubic area" of a minor, rather than explicit sexual conduct by the minor, is that "which would appeal to the lascivious interest of an audience of pedophiles" and would be unprotected whether the exhibition was of nude or covered genitals.

The conduct proved in the trial of Stephen Knox showed that he intentionally brought his activities and the material within the legitimate reach of the child exploitation statute. The child depictions were "pandered" as clearly as defendant Ralph Ginzburg pandered his otherwise non-obscene material into the reach of the obscene mailing statute, as the Supreme Court found in declaring Ginzburg's material to be "non-mailable". See: Ginzburg v. United States, 383 U.S. 463, 466, 467-68, 470-71, 475-76 (1966) (affirming United States v. Ginzburg, 338 F.2d 12 (3rd Cir. 1964)). The concept of "pandering" is a long recognized evidentiary rule to show that material in question is clearly prohibited from the stream of commerce and the mails because of its intended exploitation of the prurient-like interests in sex for its own salacious, erotic, abnormally lustful, and stimulating qualities, rather than for any legitimate literary, artistic, political, or scientific purpose. See: Ginzburg, supra; Mishkin v. New York, 383 U.S. 502, 509 10 (1966); Hamling v.

United States, 418 U.S. 87, 130 (1974); Splawn v. California, 431 U.S. 595, 597-98 (1977); and Pinkus v. United States, 436 U.S. 293, 303-04 (1978). See also: United States v. Dost, 575 F.2d 1303, 1305 (10th Cir. 1978), cert. denied, 439 U.S. 916 (1978); United States v. Battista, 646 F.2d 237, 244-45 (6th Cir. 1981).

The child exploitation statutes are intended by Congress, by the plain meaning of the statutes read as a whole, to prevent and prohibit the exploitation of minors for sexual purposes. Applying the pandering principle is a proper and established method for courts to discern whether a defendant before the court is the subject of proper conviction by focusing on the conduct of the defendant as "child pornographer" and sexual-exploiter of children. Whatever legitimate uses or intentions there may ever be as to some forms of child nudity or sexual depictions, to which Justice O'Connor referred in New York v. Ferber, 458 U.S. 747, at 775 (1982) (concurring), the intentional pandering of a visual depiction as that of child sexuality should not and need not escape the proper reach of federal law. Pandering thus acts as a form of narrowing of the proposed child pornography statute by allowing proof of intended sexual exploitation of a minor to eliminate any claims of innocent or serious value purposes.

S. 1237 IS NEEDED AND SHOULD BE ENACTED:

The only prudent course for Congress to take is to enact S. 1237 and justify its passage with a strong legislative history and clear statements of intent that the law and the legal system must protect children from being victimized by the existence of pictures of child sexuality that are distributed for no good reason.[12]

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12 Both Great Britain and Canada have modernized their child pornography laws to prohibit both actual and apparent child sex images.

The Protection of Children Act of 1978, for Great Britain (as well as the laws of Scotland and Northern Ireland), criminalizes "the possession of indecent photographs of children" and was amended in 1994 to include the addition of "pseudo-photographs" (whether in print or computer storage). The British act defined "Pseudo-photograph" as "an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph." The act also provided: "If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult."

The Canadian Act of 1993, Bill C-128, prohibits "child pornography" that includes "a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaging in explicit sexual activity, or (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years".

Both the British and Canadian laws have versions of a good faith defense for legitimate purposes, but which also exclude any defense when the material is represented to be child pornography (similar to the proffered defense and pandering provision set forth above).

PART II

THE HARM OF "APPARENT" CHILD PORNOGRAPHY

The sexual use of children is criminal. The issue presented by the debate regarding "apparent" child pornographers is not only the harm to children in the production of child pornography, but also what appears to be sexual conduct in its final form, and the resulting harm to children not depicted in the pornographic images.

Manipulated and computer generated imagery of children engaged in indecent acts involves a process known as "morphing." The pornographer scans a photographic image of the head of a child into a computer. These images are pulled from magazines and store catalogs where young children are used as models for the advertising of many benign products. Then, an indecent image from an adult magazine is scanned into the same computer. The graphics software of the computer allows a pornographer to combine the two images placing the innocent image of the child's face and head on to the pornographic picture of the adult body. The software is sophisticated and allows the operator to remove public hair, shrink the size of the genitals, breasts, and/or other body parts, adjust skin tones, and otherwise manipulate the images to create a very convincing piece of child pornography.

Someone who is knowledgeable can create child pornography with nothing more than a modern graphics program

and his imagination. The image generated by a computer can be so "perfect," the naked eye could not determine whether the image was created from a photograph of a real child or from the computer user's imagination. With this new technology, pedophiles can greatly expand their child pornography collection.[13] Currently this type of child pornography is a problem for law enforcement officials and prosecutors because it does not fit within the current legal definition of child pornography. As of 1996, there are no child pornography statutes that prohibit images created without the use of a "real" child. Virtually no statute requires that the prosecution be able to identify the child depicted, but the prosecution must prove to the trier of fact that the image if of a real child being exploited.

Unlike magazines, photographs or video cassettes, pornographic images held on computer are easily copied without expensive or bulky equipment. The quality of the image, since it is in digital form, does not deteriorate during reproduction, no matter how many times copies are made. Furthermore, computer pornography can easily be passed on, either on small and anonymous disks, or over telephone lines. Additionally, computers are extremely accessible to children. There have been many cases of pedophiles

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13 Detective Bill Dworin, Supervisor of Sexually Exploited Child Unit of the Los Angeles Police Department arrested a pedophile in 1995 for possession of child pornography who also had such "apparent" child pornography in his possession. Inn 1995 & 1996, Senator Orrin Hatch introduced legislation, which would amend the federal child pornography statutes to include this type of computer created child pornography.

attempting to and succeeding in luring children into sex by passing pornography via bulletin boards, a result that would not be changed whether the child pornography was real or apparent.

In the current legal limbo environment in which apparent child pornography exists, pedophiles are free to use the computer technology to feed their habits. Manipulated imagery has the same effect on pedophiles as actual child pornography, and therefore, is every bit as dangerous to society as actual child pornography.

There are five primary reasons why child pornography is so important to pedophiles and situational child molesters, and four of these five are just as dangerous whether the child depicted in the image is real or apparent. Dr. Shirley O'Brien concludes that child pornography is a key to stimulate the perpetrator and "lower the child's inhibitions."

Pedophiles and child molesters use child pornography:

1. *For personal sexual stimulation,*
   Child pornography provides a powerful erotic stimulus to achieve sexual arousal, relive prior sexual acts, visualize fantasies, and focus attention during masturbatory manipulation when alone;

2. *To reduce the inhibitions of the child,*[14]
   After a child's initial shock, a molester will point

[14] Scott, *supra* note 3, at 9; O'Brien, *supra* note 3, at 89-90.

out that the children and adults in the pictures are enjoying their mutual sexual activities and that "lots of kids do it, pictures don't lie." The perpetrator can then convince the child that its normal for children to be sexually active with adults, and their fears are unfounded.

3. *As an instructional tool,*
pornography is used literally as a textbook of visual instructions to educate children to perform specific sex acts;

4. *For barter, trade, or sale,*
transactions may be for money, pornographic materials, or information about how to gain sexual access to children;

5. *To blackmail the child,*
"Silence is golden when a child has been abused," according to one molester. In addition to silence, a child may be required to recruit siblings or friends for the molester. Many times children are told that they will be ridiculed, disbelieved, or reprimanded by their parents and police if anyone finds out what has taken place. A pedophile knows how to put a heavy burden on the child to bear the blame if his family is broken up and he's taken away or his parents break up, etc., if the incident ever becomes public.

Therefore, the presence of child pornography is not only evidence of past abuse of child sex abuse victims, but a threat to other children who will become victims of future molestations and sexual exploitation. All forms of child pornography continue the cycle and contribute to the

proliferation of child sexual abuse.

Law enforcement studies have established that almost all pedophiles and some situational child molesters collect child pornography and child erotica.[15] Detective Bill Dworin of the Los Angeles Police Department's Sexually Exploited Child Unit estimated that of the 700 child molesters in whose arrest he has participated during the preceding ten years, more than half possessed child pornography.[16] About 80 percent of the molesters owned either adult or child pornography.[17] Child pornography plays a central role in child molestation by justifying the molesters' conduct, assisting them in seducing their victims, and providing a means to blackmail the children they have molested in order to prevent exposure of their activity to others.[18]

Although the law treats these images as harmless, to a pedophile these computer generated images are just as precious. He uses them to stimulate himself sexually, to instruct, seduce and lower the inhibitions of children he can then molest and photograph, and he trades and sells these images for others. These images help keep the market for child pornography thriving. For these reasons, the National

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15 Kenneth V. Lanning, National Ctr. for Missing & Exploited Children, *Child Molesters: A Behavioral Analysis* 23 (3d ed. 1992) [hereinafter *Child Molesters*].

16 Cited by Senator Jesse Helms, in his testimony supporting harsher sentencing for violations of child pornography laws. 137 Cong. Rec. S10,322, S10,323-24 (July 18, 1991); 137 Cong. Rec. S9,468-03, S9,482-83.

17 *Id.*

18 137 Cong. Rec. S9,468-03, S9,482 83 (citing Senate Permanent Subcommittee Staff Interview, Sept. 1985).

Law Center recommends that federal and state child pornography laws be amended to criminalize the production, distribution, receipt, and possession of this high-tech sexual exploitation of children.

STUDIES DEMONSTRATING THE LINK BETWEEN CHILD PORNOGRAPHY AND CHILD MOLESTATION:

The link between pornography and child molestation is well documented. First, a study completed in the 1980's by Dr. William Marshall reported that 67% of child molesters and 83% of rapists admitted to using hard core sexual materials.[19] Further, Dr. Marshall found that 53% of all child molesters reported deliberately viewing the materials in preparation for molestation, and heterosexual child molesters with more than three victims were significantly more likely to use sexually explicit materials to instigate their crimes than were other sexual offenders.[20] Second, a law enforcement study of 1,400 sexual exploitation cases, conducted in Louisville, Kentucky, revealed that a significant number of molestation cases involve child pornography.[21] In forty major cases, each of which involved twelve or more victims, all of the cases involved various forms of adult pornography and in most cases, child nudes

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19 William L. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders*, 25 J. of Sex Res. 267, 279-80 (1988).

20 *Id.* at 282-83.

21 137 Cong. Rec. S10,322-04, S10324 (statement of John B. Rabun, Deputy Director, The National Center for Missing & Exploited Children).

and/or child pornography were found at the time of arrest or execution of search warrants.[22]

Finally, a comprehensive study was conducted by the Los Angeles Police Department over a ten-year period. The study found that 62 percent of preliminary investigations into extrafamilial child sexual abuse showed indications that pornography was involved, and upon further investigation, pornography was actually recovered from the child molesters in 88 percent of those cases.[23]

Along with other studies,[24] these numbers firmly establish the direct link between the actual molestation of children and the use of adult and child pornography.

PORNOGRAPHY IS USED BY CHILD MOLESTERS TO FIND AND SEDUCE THEIR CHILD VICTIMS:

A molester often uses guile to gain access to the child. The real question is how these molesters get close to the children after the initial contact. Before any sexual advances are made, the molester generally befriends the child. Many times the friendship is developed by a formal reward system. The pedophile provides food, toys, movies, or even coins for video arcade games. This bestowing of gifts is part of an elaborate nurturing process. The molester tries

22 *Id.*

23 Ralph W. Bennett & Daryl F. Gates, *The Relationship Between Pornography and Extrafamilial Child Sexual Abuse*, The Police Chief, Feb. 1991, at 14, 19 (study conducted between 1980 and 1989).

24 *See* Senate Subcomm. on Investigations of the Comm. on Governmental Affairs, *Child Pornography and Pedophilia*, S. Rep No. 537, 99th Cong., 2d Sess. (1986).

to meet and feed the needs of the individual child. After the initial benevolence, the next step is simply to maintain a friendship with the child. If the molester can become the child's confidante, he has created the perfect entrance for sexual abuse.[25]

After the initial liaison is completed, the molester continues the friendship by rewarding the child. The cycle of victimization at this point may accelerate to more frequent sexual abuse of the original child and may expand to include additional children. The escalation may be due to the victim's desire to please the molester and even share the wealth. Considering the subtle process many pedophiles use, it is normal to have victims deny the victimization and actually seek out the affection attached to the sexual performance.

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For more than 40 years, I was a loving friend to hundreds of little boys. I took them fishing, helped them with homework, and listened to their problems. Their parents never suspected I was also having sex with them. . . . Meeting children was simpler than you might imagine. I never had to force or intimidate them, or offer them money or bribes. Most of them came along with me willingly. . . . A [child] who isn't getting the affection and recognition he/she craves is at greatest risk [for molestation]" Testimony by Ross M. Nelson, who was convicted of two counts aggravated sexual assault in 1983 and was serving a twenty year sentence in a Texas jail. *Redbook*, 85 (April 1992). When arrested, he had rooms full of adult and child pornography and child erotica which he used in the seduction process.

The molester has such success with children because he communicates with them at their emotional and psychological level. He plays their games, speaks their language, and even likes their toys. This affinity for children's pleasures increases the molester's opportunities to abuse children; however, this propensity is dangerous for him. Each time the molester makes a play for a child, he leaves behind valuable bits of information. When properly discerned, these bits can become strong evidence to be used against the molester. A child's story of being molested in a "one-on-one" situation can be given great creditability by other children who were approached by the molester in the same manner as your victim, even if the approach in their case did not lead to abuse.[26] Always view a given instance of child sexual abuse as a starting point for your investigation, rather than as the end. Work backwards to the opening contact between child and abuser.

HOW CHILD SEXUAL ABUSE IS INITIATED:

The molestation process follows a typical pattern known as the cycle of victimization. First, adult pornography is casually shown to a target child. This "sex education" is designed to raise the child's curiosity level. The child is often surprised and bewildered by the images in men's magazines but the molester explains that these images

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[26] *See* Kenneth V. Lanning, National Ctr. for Missing & Exploited Children, *Child Sex Rings: A Behavioral Analysis* 12-16 (2d ed. 1992) [hereinafter *Child Sex Rings*].

demonstrate that this kind of behavior is normal and acceptable. A number of children testified before the 1986 Attorney General's Commission on Pornography that their molester, who was perhaps their father, Boy Scout leader, neighbor, or acquaintance, showed them pornography to demonstrate that this was what "all big boys and girls did.[27]

Once the molester has used adult pornography to convince the child that sex is acceptable, even enjoyable, for children, more deviant forms of pornography are introduced to further the learning process.[28] Actual or simulated child pornography is shown to convince the child that other children regularly participate in sexual activities with adults or peers.[29] Simulated child pornography includes

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[27] For excerpts of these and many other victims' testimonies, see U.S. Dept. of Justice, *Final Report of the Attorney General's Commission on Pornography* 197-223 (1986).

[28]

> The incest started at the age of eight. I did not understand any of it and did not feel it was right. My dad would try to convince me that it was OK. He would find magazines with articles and/or pictures that would show fathers and daughters. . . . He would say that if it was published in magazines that it had to be all right because magazines could not publish lies.

Testimony by Linda S., Michael J. McManus, *Introduction* to U.S. Dept. of Justice, *Final Report of the Attorney General's Commission on Pornography* xv (1986).

[29] An exhaustive study done at The American University revealed that from 1954 until 1984, images linking children with sex significantly increased in the more common forms of pornography. Judith A. Reisman, U.S. Dep't of Justice, *Images of Children, Crime and Violence in Playboy, Penthouse and Hustler Magazines* 9 (1989). In all, the research team counted 6,004 images linking children with sex, or an average of 8 times in each issue of *Playboy*, 6 times in each issue of *Penthouse*, and 14 times in each issue of *Hustler*. *Id.* at 106. Received both by juvenile and adult readers, child imagery in the context of erotica/pornography increased nearly 2,600 percent from 1954 to 1984. *Id.* at 1. "Nearly two-thirds of the child scenarios were sexual and/ or violent . . . [T]he dominant age bracket was 3 to 11 years; girls

pictures of youthful looking adults dressed up and acting as children or computer generated images of children involved in sexual activity. These images can be real or merely created out of the imagination of a computer user, either way they have the same devastating effect on the children who see them. Continued exposure to the pornography lowers the inhibitions of the child to a point where he allows the molester to kiss and touch him sexually. Eventually, if successful, the seduction process progresses to more explicit activity between the child victim and adult or other children, using the pornography as instructional tools.[30]

[were] more prevalent than boys and most likely associated with adult males . . . Eighty (80) percent of the children were actively involved in all scenes[,] and each magazine portrayed children as unharmed and/ or benefited by adult-child sex." *Id.* The conclusion of the study was that child-adult sex was portrayed as glamorous, thereby enhancing the impression that these activities are harmless. *Id.* at 1-9. *See also* U.S. Dept. of Justice, *Final Report of the Attorney General's Commission on Pornography*, 386 (1986).

30 O'Brien, *supra* note 3, at 89-90; As one investigator detailed:

It was seduction. It was at their own choosing that they looked at the magazines. Once the pedophile realized their secret would be kept, the next time the children would visit, they would see another type of magazine, something like *Schoolgirls*, *Lolita*, or, again, if you are a boy lover, something like *Piccolo*.

These magazines depict children in the act of sexual molestation, oral copulation, sexual intercourse, sodomy, fondling, and masturbation. When looking at this material, the children appear

Finally, the molester will take photographs of the victim in a "modeling session," film home video movies, or make professional films. These images would be used to blackmail the victim,[31] to add to the molester's personal collection, to aid in the molester's future stimulation, to trade or sell

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to be enjoying it. They would be forced into it and again, the children would look at the magazines or movie, videotapes, photographs of other children, and would question, "Doesn't this hurt, isn't this wrong?"

And the pedophile would demonstrate that it doesn't hurt, that it's a good feeling, a tickling sensation. This is the beginning of the molestation.

The primary purpose of child pornography is to lower the inhibitions of the child, to show the children that other children are engaged in this type of activity, that it's a normal practice, that children should be photographed this way, that there is nothing wrong with it.

NCMEC, *Child Pornography and Prostitution*, *supra* note 10, at 4 (*quoting* an investigator's account from William Sanger, *The History of Prostitution* 453 (1858)).

31 One way the adult molester lures children is by introducing them to illegal adult activities in addition to the sexual activity. The children are given cigarettes, beer, liquor, and drugs. The molester then uses this information to threaten the children through betrayal. Mawyer, *supra* note 1, at 31; *Child Pornography and Sex Rings*, *supra* note 3, at 53; *Child Sex Rings*, *supra* note 69, at 13; O'Brien, *supra* note 3, at 93; Ann W. Burgess, Groth, and McCausland, *Child Sex Initiation Rings*, 51 Am. J. Orthopsychiatry, 110, 114 (1981).

to other pedophiles, or to seduce other child victims.[32]

Additionally, apparent child pornography that has been created by morphing a photograph of a child's head from a non-erotic context could have extremely serious consequences for the child used in the photograph. Using a child's head in an indecent composite image may cause extreme distress to the children being portrayed in this way, as well as their families. Children whose face has been perfectly morphed into indecent images may suffer shame, humiliation, and even more extreme consequences as a result of the apparent child pornographic image. Furthermore, it is not is not obvious that the image is a composite and the child and its family may have to be investigated to discover whether or not abuse of the child had actually occurred. Therefore, significant suspicion and distress would result on the innocent children and their families. No remedy for the children or their families is currently available to these victims under the law.

Furthermore, this technology can provide a loophole to subvert prosecution of actual child pornographers. If a pornographer were to be found in possession of a pornographic photograph of a child and he claimed that the image was a composite morph, there may be no way to forensically or electronically establish the truth or falsity of that assertion. Such a result is unacceptable and unnecessary.

32 Campagna & Poffenberger, *supra* note 1, at 118; Mawyer, *supra* note 1, at 34-39.

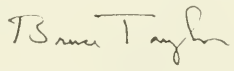
CONCLUSION

In summary, pornography is at the center of the sexual exploitation of children. It is used for enticement, seduction, instruction, blackmail, trade, and sale. Child pornography is used by pedophiles to excite and arouse themselves, to re-live and create child-sex fantasies, and it incites and stimulates them to future molestations. Both adult and child pornography are seduction tools that are shown to child victims to "educate" them and lower their sexual inhibitions. Arguments that support the notion that since no child was actually sexually exploited in the production of the image, then the image should not be prosecuted are fallacious. This is because, first, it ignores the harm caused to a child who is depicted as having been sexually used (whether or not he or she was so used), and, second, ignores the harm caused to society in general by the resulting pornography, i.e., the use of pornography in subsequent efforts to sexually molest children, and the sabotaging of child pornography prosecutions. It is an established goal of the government to protect our children against sexual exploitation, molestation, and other forms of abuse. The technology available to seriously harm children has gone beyond current law and the law should adapt to current criminal practices. Therefore, it is necessary to amend and modernize the federal child exploitation statute in order to save it.

It is our opinion that S. 1237 is a valid and constitutional means of conforming federal law with present realities and allow it to preserve our future ability to protect our children from sexual exploitation and abuse, or at least to attempt to do so by the deterrence of law and the punishment of those who so wantonly disobey our laws and desecrate our precious children.

Congress must not listen with a timid ear to those who scream the hysteria of censorship or who whisper the flattery of complacency. Congress must be strong and act forcefully against a powerful adversary that is the child pornography and pedophile underground. The National Law Center for Children and Families urges Congress to pass S. 1237.

Respectfully submitted,



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Child Pornography

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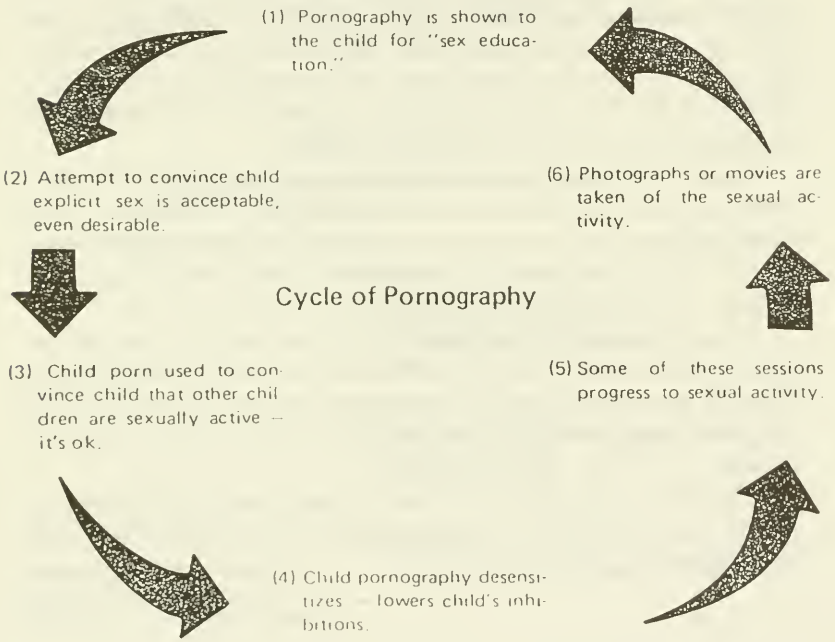
KENDALL/HUNT
PUBLISHING COMPANY
Dubuque, Iowa

9

Enticement, Entrapment, Exit

CYCLE

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:


(1) Pornography is shown to the child for "sex education."
(2) Attempt to convince child explicit sex is acceptable, even desirable.
(3) Child porn used to convince child that other children are sexually active — it's ok.
(4) Child pornography desensitizes — lowers child's inhibitions.
(5) Some of these sessions progress to sexual activity.
(6) Photographs or movies are taken of the sexual activity.

Cycle of Pornography

There are several assumptions inherent in this cycle. It is assumed that the child victim is dependent on the adult in some basic way. This is based on the fact that between 85 and 90 percent of child sexual victims know their perpetrators. The dependence may be psychological, social, physical or economic in nature. Another assumption is that the child is not developmentally or experientially capable of understanding or resisting sexual contact with someone he or she depends on for basic needs.

The cycle begins at the top of the diagram and moves counterclockwise. At the beginning, pornography is used to explain the sex act to the child. Children's testimony in court and in interviews with professional personnel has revealed that they were surprised and bewildered about the sex act. The revelation that people use their bodies in such a way, and enjoy it, was a curiosity to them.

The next step in the cycle is an attempt to present explicit sex as acceptable and desirable. Since most young children are naturally reluctant to participate in explicit sexual activities, the perpetrator must convince the child that the activities are acceptable.

Afterward, pornography is used to convince the child that other children participate in sexual activity with adults or peers. Up to this point the child might not understand that he or she could be involved personally. The perpetrator's strategy so far serves to lower the child's inhibitions. By now, the child may be persuaded that explicit sex is acceptable and other children participate often.

Some of these sessions eventually progress to sexual activity between the child and the adult or other children. In these cases, still photographs may be taken or movies made for commercial sale, to pass around to other molesters or to continue the cycle of abuse. Thus, perpetrators use pornography to achieve their purposes.

In some cases the pornography may be used simply to open up the subject with a child, without any follow-up. Or it may be used to stimulate the perpetrator, again without follow-up. But in some instances the pornography serves specifically to lead the child into explicit sexual activity.

The child pornography cycle may deviate from the pattern presented here, but the basic premise remains: pornography produces pornography.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 92-7089

UNITED STATES OF AMERICA,	:	
		SAT BELOW:
Appellee,	:	Hon. James F. McClure, USDJ
		without a jury
v.	:	CRIMINAL NO. 91-00074 (JFM)
STEPHEN A KNOX,	:	
Appellant.	:	

On Remand From the United States Supreme Court: An Appeal From a Judgment of the United States District Court for the Middle District of Pennsylvania

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BRIEF OF AMICUS

THE INSTITUTE FOR MEDIA EDUCATION

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> Tokyo police found 1200 pieces of schoolgirls' underwear and uniforms in the apartment of a man arrested for breaking into school locker rooms. . . . He became aware of the value of used schoolgirl panties for sale. . . . Schoolgirls can sell their panties for around $9 a pair. Pornography vending machines retail them for several times that much.[12]

The problem of sexualizing and abusing children will only escalate as technology becomes more versatile. Modern personal computers can now be equipped with graphics which permit pictures of children to be captured via a pedophile's zoom lens and then entered into the computer. The children can then be digitally undressed, genitalia enlarged and colored in a nonhuman way and then used in sex and violence scenes.[13] The pedophile can insert himself and/or his friends into the child abuse scenes. As "virtual reality" breaks into the home market and portable systems, a growing number of pedophiles will have

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[12] Reuters, January 5, 1994. Young male underwear is also advertised for sale in gay magazines such as The Advocate. See e.g., The Advocate, April 9, 1991 ("Hot & Sweaty! Jocks, briefs & boxers, worn to gym. . . .")

[13] The Washington Post recently reported on the use of digital imaging and some of the concerns it raises, citing one expert who answered, Photography is dead. See "Digital-Imaging Fiction Leaves No `Footprints.'" The Washington Post, Section A, p. 3 (February 21, 1994).

instantaneous access to their "panty pornography playgrounds."[14]

In sum, pornography has long given up any sole reliance on nudity, and we stand on the threshold of an explosion in the proliferation of pornographic materials.[15] If nudity becomes the legal standard, the growing pedophile population[16] will be free to access a vast body of lawful, sexually arousing child pornography. As we discuss in the next section this will serve to put children increasingly at risk for harm and sexual exploitation.

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[14] This future is not so far away. In 1992 Penthouse began to offer "virtual reality" materials for sale to its readers. On February 25, 1994 "Oprah" discussed and described a "virtual reality" Penthouse pet.

[15] Pornography is already a flourishing, multi-billion dollar industry. According to the Attorney General's Commission on Pornography, it includes more than 450 different magazines, 20,000 adult book stores and two million videocassettes and is the third most profitable business segment -- after narcotics and gambling -- for organized crime.

[16] See Bennett, W., The Index of Leading Cultural Indicators, Volume 1 at p. 11 (March 1993).

Great Britain

Protection of Children Act 1978

1978 CHAPTER 37

An Act to prevent the exploitation of children by making indecent photographs of them; and to penalise the distribution, showing and advertisement of such indecent photographs. [20th July 1978]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Indecent photographs of children.

1.—(1) It is an offence for a person—

(*a*) to take, or permit to be taken, any indecent photograph of a child (meaning in this Act a person under the age of 16), or

(*b*) to distribute or show such indecent photographs; or

(*c*) to have in his possession such indecent photographs, with a view to their being distributed or shown by himself or others; or

(*d*) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs, or intends to do so.

(2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person.

(3) Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.

(4) Where a person is charged with an offence under subsection (1)(*b*) or (*c*), it shall be a defence for him to prove—

(*a*) that he had a legitimate reason for distributing or showing the photographs or (as the case may be) having them in his possession; or

(*b*) that he had not himself seen the photographs and did not know, nor had any cause to suspect, them to be indecent.

(5) References in the Children and Young Persons Act 1933 (except in sections 15 and 99) to the offences mentioned in Schedule 1 to that Act shall include an offence under subsection (1)(*a*) above. 1933 c. 12.

(2) In Schedule 7 to the Prevention of Terrorism (Temporary Provisions) Act 1989, in Part II (Scotland) 1989 c. 4

(a) in paragraph 12 (order for production of material)

(i) in sub-paragraph (2) for the words from "he may make" to "shall" there shall be substituted the words "he may order a person who appears to him to have in his possession, custody or power any of the material to which the application relates, to—" and after the word "possession" where it subsequently appears in that sub-paragraph there shall be inserted in both places the words ", custody or power";

(ii) in sub-paragraph (5)(b)(ii), for the words from "in possession" to the end there shall be substituted the words "has the material in his possession, custody or power"; and

(b) in paragraph 13(5) (order for production made to government department)—

(i) after the word "possession" where it first appears there shall be inserted the words ", custody or power"; and

(ii) for the words "be in possession of" there shall be substituted the words "have in his possession, custody or power"

(3) In Schedule 5 to the Northern Ireland (Emergency Provisions) Act 1991, in paragraph 2 (investigative powers of authorised investigators), after sub-paragraph (1), there shall be inserted the following sub-paragraph— 1991 c. 24

"(1A) An authorised investigator may by notice in writing require any such person to furnish specified information relevant to the investigation within a specified time or such further time as the investigator may allow and in a specified manner or in such other manner as the investigator may allow.".

(4) For the purposes of section 27 of the Prevention of Terrorism (Temporary Provisions) Act 1989 (temporary provisions) the amendments made in that Act by subsections (1) and (2) above shall be treated, as from the time when those subsections come into force, as having been continued in force by the order under subsection (6) of that section which has effect at that time.

(5) For the purposes of section 69 of the Northern Ireland (Emergency Provisions) Act 1991 (temporary provisions) the amendments made in that Act by subsection (3) above shall be treated, as from the time when that subsection comes into force, as having been continued in force by the order under subsection (3) of that section which has effect at that time.

PART VII

OBSCENITY AND PORNOGRAPHY AND VIDEOS

Obscene publications and indecent photographs of children

Indecent pseudo-photographs of children

84.—(1) The Protection of Children Act 1978 shall be amended as provided in subsections (2) and (3) below

(2) In section 1 (which penalises the taking and distribution of indecent photographs of children and related acts) — 1978 c. 37

(i) after the word "taken" there shall be inserted the words "or to make", and the words following "child" shall be omitted;

(ii) after the word "photograph" there shall be inserted the words "or pseudo-photograph";

(b) in paragraphs (b), (c) and (d) of subsection (1), after the word "photographs" there shall be inserted the words "or pseudo-photographs";

(c) in subsection (2), after the word "photograph" there shall be inserted the words "or pseudo-photograph"; and

(d) in paragraphs (a) and (b) of subsection (4), after the word "photographs" there shall be inserted the words "or pseudo-photographs".

(3) In section 7 (interpretation)—

(a) in subsection (3), at the end, there shall be inserted the words "and so as respects pseudo-photographs"; and

(b) for subsection (4) there shall be substituted the following subsection—

"(4) References to a photograph include—

(a) the negative as well as the positive version; and

(b) data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.".

(c) after subsection (5) there shall be inserted the following subsections—

"(6) "Child", subject to subsection (8), means a person under the age of 16.

(7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.

(8) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

(9) References to an indecent pseudo-photograph include—

(a) a copy of an indecent pseudo-photograph; and

(b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph.".

1988 c. 33.

(4) Section 160 of the Criminal Justice Act 1988 (which penalises the possession of indecent photographs of children) shall be amended as follows—

(a) in subsection (1), after the word "photograph" there shall be inserted the words "or pseudo-photograph" and the words from "(meaning" to "16)" shall be omitted, and

(CANADA)

C-128

Third Session, Thirty-fourth Parliament,
40-41-42 Elizabeth II, 1991-92-93

THE HOUSE OF COMMONS OF CANADA

BILL C-128

An Act to amend the Criminal Code and the Customs Tariff (child pornography and corrupting morals)

AS PASSED BY THE HOUSE OF COMMONS
JUNE 15, 1993

3rd Session, 34th Parliament,
40-41-42 Elizabeth II, 1991-92-93

THE HOUSE OF COMMONS OF CANADA

BILL C-128

An Act to amend the Criminal Code and the Customs Tariff (child pornography and corrupting morals)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

R.S., c. C-46; R.S., cc. 2, (1), 27, 31, 47, 51, 52 (1st Supp.), cc. 1, 24, 37, 53 (2nd Supp.), cc. 18, 19, 30, 34 (3rd Supp.), cc. 1, 23, 29, 30, 31, 32, 43, 42, 50 (4th Supp.); 1989, c. 2; 1990, cc. 15, 16, 17, 44; 1991, cc. 1, 4, 28, 40, 43; 1992, cc. 1, 11, 20, 21, 22, 27, 32, 41, 47, 51; 1993, c. 7

CRIMINAL CODE

1. (1) Subsection 163(3) of the *Criminal Code* is repealed and the following substituted therefor:

Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(2) Subsection 163(6) of the said Act is repealed.

2. The said Act is further amended by adding thereto, immediately after section 16 thereof, the following section:

Definition of "child pornography"

163.1 (1) In this section, "child pornography" means

(*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years, or

(*b*) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(*b*) an offence punishable on summary conviction.

Distribution or sale of child pornography

(3) Every person who imports, distributes, sells or possesses for the purpose of distribution or sale

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(*b*) an offence punishable on summary conviction.

Possession of child pornography

(4) Every person who possesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

Defence

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Defences

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

Other provisions to apply

(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).

3. (1) Subsection 164(1) of the said Act is repealed and the following substituted therefor:

Warrant of seizure

164. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that

(*a*) any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, within the meaning of section 163, or

(*b*) any representation or written material, copies of which are kept in premises within the jurisdiction of the court, is child pornography within the meaning of section 163.1,

shall issue a warrant authorizing seizure of the copies.

The CHAIRMAN. Let me just say this to you, Ms. Krug, and then I have got just a couple of questions for Dr. Cline and then I have to leave and Senator Grassley will take over the conclusion of the hearing.

The proposed inclusion of the lascivious exhibition of the buttocks of any minor or the breasts of any female minor in the definition of sexually explicit conduct is really in response to the concerns raised by some family and children advocates who are aware that such depictions can be pornographic. There is some concern that this represented a loophole in the existing law.

Clearly, not every display of a minor's buttocks or breasts would or should be considered pornographic. That is precisely why the statute includes the requirement that the exhibition be lascivious. The "lascivious" requirement has been part of the statute for many years. I have faith in the intelligence and the common sense of our law enforcement officials, judges, juries, and librarians to distinguish between the Coppertone girl, a baby Jesus, "Romeo and Juliet" and real child pornography. However, I understand the concerns you raise and we are going to look to see if we can try and resolve them with our language. But I have total confidence that they can resolve these problems, and we have to have some confidence in that.

Let me go to Dr. Cline. In your knowledge and experience, do individual pedophiles or child molesters frequently have particular preferences with respect to child pornography in terms of age, physical appearance, types of sexual acts or poses, and so forth?

Mr. CLINE. Yes. Most pedophiles have special preferences, and each one is a little different and it depends on his prior conditioning. So one person will get turned on by this and another will get turned on by that. So they seek out or create their own pornography to fit those predilections.

The CHAIRMAN. Would the ability to obtain child pornography tailored to a pedophile's or a child molester's individual preferences, as is now possible through the use of computer imaging technology to produce or alter visual depictions of children engaging in sexually explicit conduct—would that have any effect on the sexual stimulation or satisfaction he receives from that material, and if so what would that effect be?

Mr. CLINE. Well, what it would mean is that you are able to tailor, create, the particular pornography that is a turn-on or an excitement for that particular pedophile.

The CHAIRMAN. Or for any group of pedophiles?

Mr. CLINE. That is correct.

The CHAIRMAN. In terms of its effect on a pedophile or child molester who uses child pornography to stimulate or whet his sexual appetite, as you put it in your prepared testimony, would the effect be different for computer-generated child pornography than for pictures of actual children engaging in sexually explicit conduct?

Mr. CLINE. None at all. What they do is they use that to stimulate themselves and then masturbate to. They do a great deal of that, and then occasionally they will move in and abuse children. But the process of masturbatory conditioning is a very powerful one in not only the creation of the illness, but also in maintaining it.

The CHAIRMAN. In your prepared statements, both you and Ms. Jepsen noted that child pornography is sometimes used by child molesters to seduce children into engaging in sexual acts. Based on your own knowledge and clinical experience, including individuals you have treated, could you provide any information as to the percentage of cases of child sexual abuse or exploitation in which child pornography was used as a seduction tool?

Mr. CLINE. My guess is it would be roughly about a third.

The CHAIRMAN. About a third?

Mr. CLINE. Yes.

The CHAIRMAN. With respect to the use of child pornography as a means of seducing or breaking down a child's inhibitions to sexual abuse or exploitation, would the effect on the victim be different for computer-generated pornography than for pictures of actual children engaging in sexually explicit activity or conduct?

Mr. CLINE. None at all. There would be no difference.

The CHAIRMAN. With today's computer technology, a pedophile or child molester can take innocent pictures of a child and then reproduce the pornographic depictions featuring that child engaging in sexual conduct. Those depictions can then be shown to that child or others who may know the person depicted in an effort to seduce them for sexual abuse or exploitation. In your opinion, what effect would seeing such depictions have on a child?

Mr. CLINE. It would be extremely traumatic.

The CHAIRMAN. And could change that child's whole psyche and outlook?

Mr. CLINE. Absolutely. I work with lots of adults who have been sexually abused as children and who have been through this experience and the trauma and the impact remains pretty much lifelong, in my experience.

The CHAIRMAN. Thank you, doctor. I thank all of you for being here. We will turn now to our ranking member, Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman. You have assembled a first-rate panel here and I appreciate that.

One of the things we don't want to do is we don't want to suggest that we are able to do something to deal with the problem and then not have it very efficacious. We have an interesting and knowledgeable panel here. I think of you as "commissioner," commissioner. You were the chairman of a commission that was roundly criticized by liberals, and you are here before us, I think appropriately, putting up some red flags about what portions may or may not cross the line of constitutionality.

Mr. Taylor, I thought your suggested solutions and your commenting on Professor Schauer's comments were very informative. What I would like to ask your permission, since time won't permit now, is whether or not I would be able to see each of you either together or individually, to set up an office appointment because I have a lot of things I would like to pursue with you, if you would be willing.

Mr. SCHAUER. Absolutely, yes.

Senator BIDEN. Would you be willing to do that, Mr. Taylor?

Mr. TAYLOR. Yes.

Senator BIDEN. I think both your comments have been very informative.

I would like, in the few moments I have, to focus on Dr. Cline's comments because, quite frankly, Dr. Cline, as long as I have been on this committee, one of the things I think we up here lack the most is hard data on why people commit the crimes they commit.

I was recently with a group of neurologists and neurosurgeons. I got to know these guys pretty well because I had a couple of aneurysms and it is funny how you get to become friends when they save your life. I have been exposed—I mean this sincerely—to this larger retinue of leading neurologists and neurosurgeons, and one of the things that Ms. Jepsen referenced was the work of Dr. Reisman about the physiological changes that take place in the brain. One of the leading neurologists in America, if not the—well, there is no one leading, but one of the nationally recognized neurologists, the head of the Department of Neurology at Cornell University in New York City, is a fellow who is going through some data with me working on drug abuse matters, an area that I have a keen interest in.

Talking about this whole question of free will: When does, in effect, free will get negated by conditioning along the lines—and I am oversimplifying in the interest of time—along the lines that Dr. Reisman had talked about where you literally condition the mind in a way that it is very much more difficult for one person to resist aberrant behavior more than another, and how does that impact on our notion of free will?

That is a long prelude to a relatively short question. Is there a distinction, doctor—you have indicated this is learned behavior—is there a distinction between learned behavior of a pedophile, the learned behavior to create a pedophile, and, for example, the learned behavior that creates a violent person with no sexual overtones to it, or that creates a compulsive burglar or a thief? I mean, are there distinctions?

We are wandering into an area here that we are trying to intelligently distinguish. We are saying here, the acting chairman and Senator Feinstein and all of us, that pedophiles are, in effect, the worst among us. I have even drafted legislation unrelated to pornography that suggests that pedophiles be given a different penalty for their actions than others because the rate of recidivism is so extremely high. You indicated in your comments that the cure rates are not nearly as high in this area of sexual deviation as they are in some other areas.

Is there any distinguishing feature between the antisocial behavior that is generated as a consequence of sexual aberrations and antisocial behavior generated as a consequence of violent behavior, exposure to violence, or any other pathology? Am I making any sense?

Mr. CLINE. Yes.

Senator BIDEN. I am not even sure I have asked the question right.

Mr. CLINE. I struggle with those same problems you are, but my best sense is—I attended not long ago a world conference on psychopathy, the anti-social personality, in France and the best sense not only from that conference but from other data is that there is a genetic contributor to this, in addition to problems in environ-

ment. But there is a very strong, powerful genetic contributor in the anti-social personality.

With the person who is the sexual addict, whether they be a pedophile or a rapist or compulsively promiscuous, or whatever it is, that is, in my judgment, learned behavior and if you don't treat it as an addiction and use the techniques therapeutically that you would use with an addiction—cocaine addiction, sexual addiction—the person won't get well. In a sense, they do lose their free agency and they do things that they hate and they regret, and because of this they hide it. It is a hidden illness, and I see many, many husbands and wives where the wife is totally unaware of her husband's secret life until something accidentally reveals it. So I am having some success in treating these people, but you have to use the technology that we have for treating addiction. The man cannot heal himself, just by himself.

Senator BIDEN. My time is up, but, Mr. Chairman, if I could make a request, not ask a question? Doctor, you referenced Dr. Stanley Rachman's report.

Mr. CLINE. Yes, sir.

Senator BIDEN. I know when I was chairman we tried not to put too much in the record in terms of the cost of reprinting it, but would you give me a cite for that later or, if you have a copy of it, send it to me?

Mr. CLINE. It is in my hand-out.

Senator BIDEN. Oh, it is in the hand-out? The cite is in the hand-out?

Mr. CLINE. I cite that reference.

Senator BIDEN. Second—and it is good to see you again, Ms. Jepsen—would you be kind enough to, if you can find it for us, give us a cite for Dr. Judith Reisman's——

Ms. JEPSEN. It is in the hand-out.

Senator BIDEN. It is in the hand-out as well. Well, I thank you both, and I think your suggestion of us looking at what Canada is doing and what England has done is a very worthwhile thing for us to do. I thank you all.

Ms. Krug, your cautionary concern is legitimate and I think there is a way to do it constitutionally without denying people access to art and yet meet our objectives. But I think you have raised legitimate concerns. I thank you all. You are a very good panel. I appreciate it.

Senator GRASSLEY [presiding]. Mrs. Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman. Dr. Cline, I wanted to comment on your testimony because I found it to be very significant and, in a sense, perhaps the most important testimony I have ever heard on this subject.

In the 1970's while I was a county supervisor, I authored pieces of legislation relating to pornography, in general, and, of course, found that local jurisdictions had very little ability to control it outside of the zoning powers, which we then in San Francisco subsequently tried to use. But all during that period, having sat in many public hearings—this is my first in this body—I have never heard a clinician actually come forward and give the very significant testimony that you have given.

If I understand your words correctly, what you have said is that essentially what you have found in your practice is that pornography actually reinforces the individual's ability to go out and commit the act. Is that correct?

Mr. CLINE. Absolutely, absolutely.

Senator FEINSTEIN. Now, that is very significant expert testimony, I think. You know, I think what one has to do when legislating for the public good is really weigh the factors of what, for example, Ms. Krug had to say versus what you are saying. If you weigh the public good, you clearly, in my view at least, have to come down where you are in saying that there is an enormous public good by really trying to stamp this stuff out as much as we possibly can.

I, too, like Senator Biden, would very much appreciate receiving any other papers that you may have written or any other specific citations that you may be willing to provide because I really found your testimony extraordinarily vital and important because it is expert testimony.

Mr. CLINE. I have written and published in this area and I would be happy to share that with you.

Senator FEINSTEIN. I thank you very much and I thank everyone very much.

Senator BIDEN. Mr. Chairman, I have to leave. I suspect we all do, but I just want to warn my two colleagues I will be calling to ask if you will be willing to sit down with us, OK?

Mr. SCHAUER. Yes.

Senator BIDEN. Thank you very much. Thank you all.

Senator GRASSLEY. This material that was handed out to you—I suppose this is more for Ms. Krug and Mr. Taylor, but I think this may be some of the stuff that you were referring to that could be prosecuted. This is kind of an illustration of the type of stuff that you suggest might be classified as child porn under the amended definition in Senator Hatch's bill. Several of these pictures include depictions of genitals or the pubic area of individuals.

Now, the question is, under current law, lascivious exhibition of the genitals or pubic areas is already included. Have any of the art works that you submitted been prosecuted as child porn?

Ms. KRUG. Not currently. However, several of these have come under question in regard to the Communications Decency Act which is part of the Telecommunications Reform Act of 1996, and it is that kind of an issue that is now being litigated in both the third circuit and the second circuit.

Senator GRASSLEY. Do you know of any prosecutions, Mr. Taylor?

Mr. TAYLOR. Senator, there have not been any prosecutions either as obscenity or child pornography or as indecency. If the bill that the Senate is considering today applied to these kinds of pictures, you know, paintings and sculpture would be unconstitutional, and it doesn't. As I read the bill and as the bill states, it is visual depictions that look like they are real photographs of real kids, not paintings that look like paintings.

I think, as I have suggested, it might help to—it is not so much that Ms. Krug is wrong in bringing up this point. They are not lawyers; they don't know what the courts are going to do, necessarily, and she would be legitimately worried if the bill really did apply

to that. But some of the things like defining "appears to be," putting statements of congressional intent, making it clear from your legislative record that you are not after anything that pretends they are a child. If, in a movie, you have got an adult that is pretending they are playing "Romeo and Juliet," nobody thinks that is children being abused.

This bill is aimed at that which you can't tell from real child pornography and that is not something that the libraries would be worried about. So it is more a question of making sure that those kinds of fears that are good ones do not become reality under the law. Even the kinds of pictures that Ms. Krug brought up, the paintings and the sculpture, those kinds of materials aren't even indecent, as the law has been defined by the Supreme Court and as used by the FCC.

So in the lawsuits that are challenging the Communications Act in both Philadelphia and in New York City—and we have filed amicus briefs in those, too. One of the things that I have done for the courts is to say indecency as used by the FCC and as defined by the Supreme Court is limited to patently offensive pornographic references that are harmful to minors. It is not just something that people think is offensive. It is not just dirty words. It has to be those words that have absolutely no value and are meant to offend and shock, and all of that, so that it wouldn't apply to paintings and Michelangelo's "David" or "Ulysses."

The FCC said you could read "Ulysses" on the radio and that you could play John Gotti's seized wiretap tapes on the radio and that you can play teenage sex education movies on television. So the indecency standard, as well as obscenity and child pornography, is widely more feared than it is applied, and that is why I think this law is more narrow than it might appear to be, but it is a good reason for this committee to make it clear in its reports.

Ms. KRUG. I think Mr. Taylor brought up the very point that we are concerned about. Some people might believe that, which means that librarians and publishers and booksellers spend their time trying to second-guess what some people may consider to be improper. Then we in libraries have an economic disincentive to make ideas and information available that some people may consider to be beyond the pale because then we utilize our resources making sure that the broad range of ideas and information continues to be available for everyone. So what we need is specificity, very carefully honed definitions that apply to precisely the kinds of materials that are considered to be illegal under this law.

Senator GRASSLEY. Mr. Schauer, before you comment, I just want to make clear, though, that we are talking today just about child pornography and not about obscenity. The second point I would make is, Ms. Krug, you were talking about economic incentive to make a decision.

Ms. KRUG. Disincentive.

Senator GRASSLEY. Disincentive.

Ms. KRUG. Economic disincentive. In other words, I mean, if there is a chance, the problem is that so many librarians will say, well, you know, we don't exactly know what the law is and therefore we won't include that material, and that is what we are trying to preclude.

Senator GRASSLEY. OK. Now, I know libraries are non-profit organizations for the most part, but the argument you just used was used by the publishing industry in 1986 when we got the *Ferber* case Federalized and was the basic argument against even what we have on the books today, the only point being that for profit-making organizations there is big money involved in some of these decisions they have to make and they don't want to make them because it might cut into their profits.

Mr. Schauer.

Mr. SCHAUER. Mr. Chairman, you mentioned that we are not talking about obscenity, and that is correct, but there is one area in which it is relevant. When we are talking about material that looks real but does not involve a real child, that is the area in which Justice White in *Ferber* said quite explicitly simulations are constitutionally permissible. Nothing in *Osborne* suggested even in one syllable that the definition of child pornography would be changed where we were dealing with possession. We were dealing in *Osborne* with material that was child pornography under *Ferber*.

The relevance of obscenity law is that one might think on the basis of this that even if I am right about this minor feature of 1237 and its unconstitutionality, we ought to remember that the Supreme Court in *Ginsberg*, G-i-n-s-b-e-r-g; there are several Ginsberg cases—*Ginsberg* v. *New York*, said that when material is aimed at children, the definition of obscenity may be—my word, not theirs—relaxed to take account of that fact.

Insofar as material is used in the assistance of seduction of children and insofar as that material is not child pornography, *Ginsberg* v. *New York* still provides a quite viable tool and a tool that is not nearly as stringent as the Miller test when applied to adults.

Senator GRASSLEY. You referred to the *Osborne* case. This is from a footnote, so I want to suggest in a question the applicability of that to our current situation. I don't know the footnote number here, but anyway it says in the middle of a fairly long footnote, "It is also surely reasonable for a State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."

Doesn't the rationale then apply equally as well to computer-generated child pornography because we are talking about demand of any kind?

Mr. SCHAUER. The demand that the Supreme Court was referring to in both *Ferber* and *Osborne* was the demand for the materials, but in the normal case decreasing demand is not constitutionally permissible, although it is an empirically justifiable basis. What the Court said in *Ferber* is that what would otherwise be constitutionally impermissible, trying to decrease the demand, becomes constitutionally permissible because of the overwhelming interest in protecting the real children that are in the material. That is the issue.

Where there are not real children in the material, at least if we read *Ferber*—and nothing in *Osborne* is inconsistent with that—the Supreme Court has said that this, and only this, is the justifiable exception from the use of obscenity law. Now, of course, the Supreme Court could change its mind, and I don't quarrel with the

empirical, economic, or sociological justifications of the idea of reducing the demand.

All I am suggesting is that not only does this not appear in existing law; there are strong statements in existing law about its unconstitutionality, and I am very worried that taking this minor issue relatively and waging a several-year-long constitutional battle with the time and resources that it takes is ultimately counter-productive to the very initiative that all of us in this room agree on.

Senator GRASSLEY. It seems to me that with the supply/demand argument here used that somewhere in this chain of computer-generated production there are going to be real children somewhere involved in that chain.

Mr. SCHAUER. That is undoubtedly true. At least on the existing state of the law, the use of material to seduce real children, morally appalling, is not something that the courts now recognize as a basis for an exception precisely because if we were to look at part of the other two-thirds, even taking Dr. Cline's one-third figure accurately, we would discover that adult sexually oriented material is widely used for this purpose. Indeed, as I mentioned in my written statement, things as innocuous as underwear catalogs are widely used for this purpose.

I worry that because plainly constitutionally protected material is widely used to show children the desirability of behavior that adults engage in, the courts and not just particular wings and factions of the courts—we are dealing here mostly with unanimous decisions, some written by Chief Justice Rehnquist quite recently—the courts will be so worried about this justification that they will be unwilling to overrule what *Ferber* has said about simulations and some years down the line we will be back to square one and some number of child pornographers will have gone unprosecuted in the interim.

Senator GRASSLEY. I don't have any new questions, but I think before we close maybe on the last point, Mr. Taylor, if you want to make a comment, I would be happy to receive that.

Mr. TAYLOR. Well, just that we all know that the prior decision of the Court in *Ferber* didn't address simulated child porn, except to say, well, we are only going to uphold a law against real child abuse, but everything else, including simulation, retains its first amendment protection. What this law is going to do is ask the Supreme Court to remove that first amendment protection for this kind of counterfeit child pornography, just as we asked it to remove it in *Ferber*, and that was a departure.

I think that in *Ferber* they gave enough reasons that Congress can supply to the Supreme Court and I think that the skill of us advocates is going to have less to do with the Supreme Court upholding this law than the record made by this committee or by the Congress as a whole. In other words, if you can show to the U.S. Supreme Court that without such a change, existing law is threatened because you won't be able to tell which material to prosecute as real child pornography, and if you show that children are going to be molested by the mere existence of this counterfeit child pornography that we can't distinguish from real child pornography, then that is the kind of justification that *Osborne* said was something that is a compelling governmental interest.

I think what has to be done is for Congress to tie the harm to future children and the seduction value of this material. It is an incitement tool for pedophiles and it is a seduction tool for children. That is why you have to make this departure into a new area, and I think it is worth the risk and I think it is something that if we don't do it, we are going to find ourselves that much more unable to enforce the existing Federal law next year than we are now.

Senator GRASSLEY. For the Chairman, I am going to say that we normally leave the record open. It will be left open for two reasons, if there are any additional comments you want to submit and, second, since there were six or seven of the members here and it is a full committee meeting, there may be others who want to submit questions. Normally, that is about a 2-week period of time, I believe.

The hearing is adjourned. Thank you all very much.

[Whereupon, at 12:15 p.m., the committee was adjourned.]

Calendar No. 545

104TH CONGRESS
2D SESSION

S. 1237

To amend certain provisions of law relating to child pornography, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 13 (legislative day, SEPTEMBER 5), 1995

Mr. HATCH (for himself, Mr. ABRAHAM, Mr. GRASSLEY, Mr. THURMOND, Mr. SIMPSON, Mrs. FEINSTEIN, Mr. INHOFE, and Mr. COATS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 30, 1996

Reported by Mr. HATCH, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend certain provisions of law relating to child pornography, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~SECTION 1. SHORT TITLE.~~

~~This Act may be cited as the "Child Pornography Prevention Act of 1995".~~

~~SEC. 2. FINDINGS.~~

~~Congress finds that—~~

~~(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;~~

~~(2) child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;~~

~~(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children "having fun" participating in such activity;~~

~~(4) prohibiting the possession and viewing of child pornography encourages the possessors of such material to destroy them, thereby helping to protect the victims of child pornography and to eliminate the market for the sexually exploitative use of children; and~~

~~(5) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, or viewing of child pornography.~~

~~SEC. 3. DEFINITIONS.~~

~~Section 2256 of title 18, United States Code, is amended—~~

~~(1) in paragraph (2)(E), by inserting before the semicolon the following: ", or the buttocks of any minor, or the breast of any female minor";~~

~~(2) in paragraph (5), by inserting before the semicolon the following: ", and data stored on computer disk or by electronic means which is capable of conversion into a visual image";~~

~~(3) in paragraph (6), by striking "and";~~

~~(4) in paragraph (7), by striking the period and inserting "; and"; and~~

~~(5) by adding at the end the following new paragraph:~~

~~"(8) 'child pornography' means any visual depiction, including any photograph, film, video, picture, drawing, or computer or computer-generated image or picture, whether made or produced by elec-~~

~~tronic, mechanical, or other means, of sexually explicit conduct, where—~~

~~"(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;~~

~~"(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; or~~

~~"(C) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.".~~

~~SEC. 4. PROHIBITED ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.~~

~~(a) IN GENERAL.—Section 2252 of title 18, United States Code, is amended to read as follows:~~

~~"§ 2252. Certain activities relating to material constituting or containing child pornography~~

~~"(a) Any person who—~~

~~"(1) knowingly mails, transports, or ships in interstate or foreign commerce by any means, including by computer, any child pornography;~~

"(2) knowingly receives or distributes—

"(A) any child pornography that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

"(B) any material that contains child pornography that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

"(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

"(4) either—

"(A) in the maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

"(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, shipped, or transported in inter-

state or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

"(5) either—

"(A) in the maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses 3 or more books, magazines, periodicals, films, videotapes, computer disks, or any other material that contains any child pornography; or

"(B) knowingly possesses 3 or more books, magazines, periodicals, films, videotapes, computer disks, or any other material that contains any child pornography that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a)

shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 15 years.

"(2) Whoever violates paragraph (5) of subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.".

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 110 of title 18, United States Code, is amended by amending the item relating to section 2252 to read as follows:

"2252. Certain activities relating to material constituting or containing child pornography.".

SEC. 5. PRIVACY PROTECTION ACT AMENDMENTS.

Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(1) in subsection (a)(1), by inserting before the semicolon at the end the following: ", or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, or 2252 of title 18, United States Code"; and

~~(2) in subsection (b)(1), by inserting before the semicolon at the end the following: ", or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, or 2252 of title 18, United States Code".~~

~~**SEC. 6. SEVERABILITY.**~~

~~If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such to any other person or circumstance shall not be affected thereby.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Child Pornography Prevention Act of 1996".

SEC. 2. FINDINGS.

Congress finds that—

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical

or psychological harm, or both, to the children involved;

(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children "having fun" participating in such activity;

(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

(5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit

conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

(6) computers and computer imaging technology can be used to—

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) The creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;

(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;

(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

SEC. 3. DEFINITIONS.

Section 2256 of title 18, United States Code, is amended—

(1) in paragraph (5), by inserting before the semicolon the following: ", and data stored on computer disk or by electronic means which is capable of conversion into a visual image";

(2) in paragraph (6), by striking "and";

(3) in paragraph (7), by striking the period and inserting "; and"; and

(4) by adding at the end the following new paragraph:

"(8) 'child pornography' means any visual depiction, including any photograph, film, video, pic-

ture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

"(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

"(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; or

"(C) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.".

SEC. 4. PROHIBITED ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding after section 2252 the following:

"§2252A. Certain activities relating to material constituting or containing child pornography

"(a) Any person who—

"(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

"(2) knowingly receives or distributes—

"(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

"(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

"(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

"(4) either—

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

"(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

"(5) either—

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or

"(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials

that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

"(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

"(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that—

"(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

"(2) each such person was an adult at the time the material was produced; and

"(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.".

(b) TECHNICAL AMENDMENT.—The table of sections for chapter 110 of title 18, United States Code, is amended by adding after the item relating to section 2252 the following:

"2252A. Certain activities relating to material constituting or containing child pornography.".

SEC. 5. PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN.

Section 2251(d) of title 18, United States Code, is amended to read as follows:

"(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both, but if such person has one prior conviction

under this chapter or chapter 109A, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter of chapter 109A, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 30 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.".

SEC. 6. MATERIAL INVOLVING SEXUAL EXPLOITATION OF MINORS.

Section 2252 of title 18, United States Code, is amended—

(1) in subparagraphs (A) and (B) of subsection (a)(4), by striking "3 or more books, magazines, periodicals, films, video tapes, or other material which contain any visual depiction" and inserting "any book, magazine, periodical, film, video tape, or other material which contains 3 or more visual depictions"; and

(2) by striking subsection (b) and inserting the following:

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

"(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.".

SEC. 7. PRIVACY PROTECTION ACT AMENDMENTS.

Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(1) in subsection (a)(1), by inserting before the parenthesis at the end the following: ", or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, 2252A, or 2252B of title 18, United States Code"; and

(2) in subsection (b)(1), by inserting before the parenthesis at the end the following: ", or if the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children under section 2251, 2251A, 2252, 2252A, or 2252B of title 18, United States Code".

SEC. 8. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such to any other person or circumstance shall not be affected thereby.

SEC. 9. PROHIBITED ACTIVITIES RELATING TO MATERIAL DEPICTING THE SEXUAL EXPLOITATION OF MINORS.

(a) IN GENERAL.—Chapter 110 of title 18, United States Code, is amended by adding after section 2252A, as added by section 4 of this Act, the following:

"§2252B. Certain activities relating to material depicting the sexual exploitation of minors

"(a) Any person who—

"(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any visual depiction, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

"(2) knowingly receives or distributes any visual depiction or any material that contains a visual depiction that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

"(3) knowingly reproduces any visual depiction for distribution through the mails, or in interstate or foreign commerce by any means, including by com-

puter, if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

"(4) either—

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any visual depiction; or

"(B) knowingly sells or possesses with the intent to sell any visual depiction that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including computer, or that was produced using materials that have been mailed, or shipped or transported in interstate commerce by any means, including by computer;

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct; or

"(5) either—

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions; or

"(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more visual depictions that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

if such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct;

shall be punished as provided in subsection (b).

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the production, possession, receipt,

mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

"(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of a visual depiction that would be prohibited under this chapter if it had occurred within the special maritime and territorial jurisdiction of the United States, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 110 of title 18, United States Code, is amended by adding after the item for section 2252A the following:

"2252B. Certain activities relating to material depicting the sexual exploitation of minors.".

(c) DEFINITION.—Section 2256 of title 18, United States Code, as amended by section 3 of this Act, is amended—

(1) in paragraph (7), by striking "and";

(2) in paragraph (8), by striking the period and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(9) 'identifiable minor'—

"(A) means a person who—

"(i) was a minor at the time the visual depiction was created or at the time the person's image was captured on the visual medium used in creating, modifying, or adapting such visual depiction; and

"(ii) is recognizable in the visual depiction as an actual person by the person's likeness or other distinguishing physical characteristic, such as a unique birthmark or other recognizable feature; and

"(B) shall not be construed to require proof of the actual identity of the minor.".

SEC. 10. AMBER HAGERMAN CHILD PROTECTION ACT OF 1996.

(a) SHORT TITLE.—This section may be cited as the "Amber Hagerman Child Protection Act of 1996".

(b) AGGRAVATED SEXUAL ABUSE OF A MINOR.—Section 2241(c) of title 18, United States Code, is amended—

(1) by inserting "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or" after "Whoever"; and

(2) by adding at the end the following: "If the defendant has previously been convicted of another Federal offense under this subsection or under section 2243(a), or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.".

(c) SEXUAL ABUSE OF A MINOR.—Section 2243(a) of title 18, United States Code, is amended—

(1) by inserting "crosses a State line with intent to engage in a sexual act with a person who, or" after "Whoever"; and

(2) by adding at the end the following: "If the defendant has previously been convicted of another Federal offense under this subsection or under section 2241(c), or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.".

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